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January 26, 2005

Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ***ADM File No. 2002-29 – Comments of the Attorney Discipline Board Regarding the Proposed Michigan Standards for Imposing Lawyer Sanctions***

Dear Mr. Davis:

These Comments are submitted to the Michigan Supreme Court by the Michigan Attorney Discipline Board (ADB or Board) in response to the Court's publication of the Proposed Michigan Standards for Imposing Lawyer Sanctions for comment by interested persons. In addition to the general comments in this letter, the Board is submitting comments on specific standards in the attached document which compares the published standards with the ADB proposal and the recommendations submitted by Mr. Campbell.

In the comments that follow:

- "ADB" or "ADB/ABA" will mean the standards proposed by the ADB.
- "Published" will refer to the proposed standards published for comment in the Court's July 29, 2003 Corrected Order in ADB File No. 2002-29.
- "Alternative Proposal" or "Alternate Standards" will refer to the standards recommended to the Court by Donald D. Campbell.

Several overarching or major issues presented by the published standards are addressed in the ADB's detailed comments, and some are highlighted here:

I. CONSIDERATION OF INJURY OR HARM

The ADB strongly recommends that, in accordance with the framework of the ABA standards, injury and potential injury should be one of the initial factors distinguishing among the generally appropriate levels of discipline to be considered before the aggravation/mitigation stage of the sanctions analysis.

The ABA standards essentially sort misconduct into a hierarchy of worst to least bad based on three factors generally present within each standard: the nature of the misconduct, the lawyer's mental state, and degree of injury or potential injury. The ADB initially questioned whether injury should be considered at this stage. So did the ABA Joint Committee on Professional Sanctions which produced the Standards in 1986.

With two exceptions (Standards 4.11 and 4.12), the ADB followed the ABA's system of classifying misconduct. In the two departures, the factor of injury was deleted and the ADB proposed a comment to the effect that injury could still be considered in the aggravation/mitigation phase of the sanctions determination. The standards published for comment by the Court have extended this approach by deleting injury/potential injury in all of the standards (4.0 - 8.0) and then adding "the degree of harm" as an aggravating factor, and "the absence of any degree of harm" as a mitigating factor.

In the attached comments to published Standard 3.0, the Board addresses in more detail the importance and implications of maintaining injury in its place within the framework of the ABA Standards. In short, the Board suggests to the Court that adoption of the ADB/ABA structure will best promote the Court's objectives as articulated in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000).

The published standards place harm and the absence of harm among a list of free-floating, unweighted aggravating and mitigating factors, whereas the ADB/ABA standards fix the injury factor in a matrix calibrated to sort types of misconduct into categories, still broad but helpfully narrowed, for which sanctions are recommended. Yanking the injury factor from this structure yields some questionable, and perhaps unintended, results and may afford hearing panels less, rather than more, guidance. See, for example, the potential problems and/or questionable results which could result from application of the following published standards:

- *Standard 4.41(a)*: The ABA Standards and the standards proposed by the ADB suggest that disbarment is generally appropriate when a lawyer abandons the practice of law, and causes "serious or potentially serious injury to a client." By contrast, both alternatives to Standard 4.41(a) published by the Court eliminate consideration of the degree of harm at this stage and recommend disbarment as generally appropriate when a lawyer abandons the practice of law, regardless of the degree of harm to the client or, apparently, without any injury to clients at all. Thus, a hearing panel seeking guidance from the published Standards when a lawyer has abandoned an active

caseload of hundreds of files with no thought for the protection of the clients' interests or a lawyer who "abandons the practice of law" with no active clients but with one or two unanswered letters will seemingly be directed to consider disbarment in both cases. (Note that under published Standard 9.32 [mitigation], the panel could differentiate between the two situations on the basis of harm to a client only if it found that the second lawyer's conduct was accompanied by "absence of any degree of harm.")

- *Standards 4.41(b) and (c) and 4.42(a) and (b)*: Under the ABA Standards and the standards proposed by the ADB, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes "injury or potential injury" to a client. The same conduct should generally warrant disbarment in the existing standards if accompanied by "serious or potentially serious injury" to a client. With the elimination of any reference to injury, published standard 4.41(b) proposes (in Alternative A) that disbarment is generally appropriate when "a lawyer knowingly fails to perform services for a client." Identical language then appears in Alternative A's Standard 4.42(a) which *also* recommends that suspension is generally appropriate when "a lawyer knowingly fails to perform services for a client."

  In short, Alternative A to proposed Standard 4.4 provides no guidance to the panelist or practitioner attempting to discern a difference between conduct warranting disbarment and conduct warranting suspension since both sanctions are deemed to be appropriate when "a lawyer knowingly fails to perform services for a client."

- The same, presumably inadvertent, problem exists with respect to 4.41(c) and 4.42(b) in Alternative A to published Standard 4.4. By eliminating the references to injury, the standards proposed by the Court have eliminated any means of distinguishing between conduct warranting disbarment and conduct warranting suspension for a lawyer who "engages in a pattern of neglect with respect to client matters."

- *Standard 6.1*: Existing ABA Standard 6.1 deals with conduct broadly characterized as involving dishonesty, fraud, deceit, or misrepresentation to a court. It reserves disbarment for conduct which involves an intent to deceive the court and which results in either serious or potentially serious injury to a party or causes a significant or potentially significant adverse effect on the legal proceeding. At the lower end of the hierarchy presented in ABA Standard 6.1, admonition is generally appropriate when a lawyer engages in an isolated incident of neglect in determining whether

statements or documents submitted to a court are false, under circumstances resulting in little or no actual potential injury to a party or with little or no adverse or potentially adverse effect upon the proceeding.

By contrast, Published Standard 6.1 removes consideration of the impact on a party or the tribunal from the equation at the initial stage. Thus, under published Standard 6.11, disbarment is deemed to be generally appropriate for the lawyer who, in order to meet a filing deadline, knowingly submits a pleading containing immaterial inaccuracies as well as for the lawyer who knowingly submits a forged order.

Published Standard 6.11 also adds a lawyer's failure to disclose adverse controlling authority to the types of misconduct for which disbarment is generally appropriate if the lawyer intended to obtain a benefit or advantage. Under Published Standard 6.12, suspension would generally be appropriate when a lawyer knowingly fails to disclose adverse controlling authority, but without intending to obtain a benefit or advantage. Published Standard 6.1 describes no circumstance under which reprimand would be generally appropriate for such conduct.

While the Board does not mean to suggest that knowing failure to cite controlling adverse authority should not be treated seriously, limiting the range of generally acceptable sanctions to suspension and disbarment, even if the failure to disclose controlling authority had little or no potentially adverse effect on the legal proceeding, could result in disproportionately harsh sanctions in some cases.

- *Standard 6.2*: As with Published Standard 6.1, Published Standard 6.2 limits the range of generally appropriate sanctions. In cases involving a lawyer's knowing violation of a court order or rule, the recognized sanctions are disbarment or suspension, depending only on whether or not the lawyer intended to "obtain a benefit or advantage," but without any reference to the degree of injury to a party or the potential interference with a legal proceeding. The suggested sanction of disbarment under Proposed Standard 6.21 for a lawyer who knowingly violates a court's rule by filing a brief which exceeds the page limitation (MCR 7.212(B)) or by reading a magazine in the courtroom (Rule 8.115(C)(3) of the Local Rules of the Sixth Judicial Circuit) could be viewed by some as unduly harsh.

II. COMPETENCE.

The ADB recommended keeping the ABA structure which differentiates between a diligence standard in 4.4 and a competence standard in 4.5. The Alternative Proposal collapses diligence and competence together in Standard 4.4, and creates a new standard for excessive fees in 4.5. The Court published the Board's proposal (with injury deleted) as Alternative A, and the Alternative Proposal as Alternative B. The Board believes that competence deserves a distinct and dedicated standard, and recommends that the ADB/ABA proposed Standard 4.5, with modifications discussed below, be adopted.

A. The Duty of Competence Should Have its own Standard.

"It is no accident that the first Model Rule requires competence, for the drafters of the Model Rules believed that the first rule of legal ethics is competence." Ronald D. Rotunda, *Legal Ethics: The Deskbook on Professional Responsibility 2002-2003*, p 62. The Model Rules separated the duty of competence from the duty of diligence, which the Code of Professional Responsibility had conjoined. The ABA Ethics 2000 Commission considered merging Rules 1.1 (competence) and 1.3 (diligence) but decided not to make this recommendation to the House of Delegates. 1 Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering* (3rd ed), §3.2 n 1, p 3-7.

The Board notes that debate in connection with Rule 1.1 is most often about enforceability and practicality, and not about the coverage of the rule. Competence is a duty under Model and Michigan Rule of Professional Conduct 1.1. Michigan and other jurisdictions may wrestle with the fact that incompetence can come in many forms and can overlap other ethical violations. Lawyer incompetence can have complex causes and can be difficult to remedy. Nonetheless, it exists and it can be different than neglect, or, to use the language of the Model Rules, lack of diligence. A separate standard for sanctioning incompetence made sense to the ABA in 1986 and continues to make sense to the ADB. The Board urges the Court to retain a separate standard.

B. The Content of a Competence Standard.

When one reads ABA Standard 4.5 in its entirety, the traditional hierarchy of misconduct may not seem to be adequately or precisely reflected in the subordinate standards (those with two numerals to the right of the decimal point). ABA Standard 4.5, with modifications proposed by the ADB, reads:

> The following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:
>
> 4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

4.52 Suspension is generally appropriate when a lawyer ~~engages in an area of practice in which the lawyer knows he or she is not competent~~ knowingly fails to provide competent representation, and causes injury or potential injury to a client.

4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) ~~is~~ negligently ~~in determining whether he or she is competent to handle a legal matter~~ fails to provide competent representation and causes injury or potential injury to a client.

It could be argued that 4.51 and 4.53(a) appear too similar in light of the difference in recommended sanctions. Upon further consideration, the ADB proposes that the following language, drawn in part from the ABA comment, should be substituted for 4.51:

> Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer cannot or will not master the knowledge and skills necessary for minimally competent practice, and the lawyer's conduct causes injury or potential injury to a client.

Promoting competence in the ranks of the profession requires the involvement of many institutions charged with the education, admission and regulation of lawyers. It may be worth noting here that the lowest rung(s) on the disciplinary/regulatory ladder, e.g., dismissals with caution, admonitions, and admonitions with conditions (such as the State Bar of Michigan's Ethics School) are not covered by any version of the proposed standards. There is growing recognition that in some cases involving minor lapses in the duty to provide competent or diligent representation, remedial, rather than punitive, consequences may be appropriate, initially. The Board looks forward to working with the Court, the State Bar of Michigan, the AGC and other interested parties on comprehensive approaches to this important issue.

III. MICHIGAN'S STANDARDS SHOULD GENERALLY FOLLOW THE TERMINOLOGY AND NUMBERING IN THE ABA STANDARDS

One of the first questions confronted by the Board in drafting the standards it proposed in June 2002 was whether to follow or jettison the ABA framework. The Board ultimately decided to largely follow the ABA Standards. This approach was taken for various reasons. First, as the Court noted in *Grievance Administrator v Lopatin*, 462 Mich 235, 240-241 (2000), "Courts [and agencies] of other states [noting roughly 30] have recognized that the ABA Standards are a valuable analytical tool for determining the appropriate sanction for misconduct." Second, Michigan has used them since the year of their adoption, 1986. Third, usage of the same language by other jurisdictions may help settle the meaning of certain terms and increases the likelihood of finding apt authority or

pertinent constructions. Fourth, language in use for many years, generally has "the bugs worked out." Fifth, untested language presents the risk of unintended consequences. Finally, with respect to drafting new standards for conduct not yet addressed by the ABA Standards, the Board preferred a deliberate approach. The ABA Standards were built upon a foundation of national caselaw, and the Board felt that a sound approach in considering new standards should include a broad survey of decisions in Michigan and elsewhere.

Our Court and its discipline agencies should not be afraid to innovate when experience points to a significant problem and to a clearly better way of doing things. However, changes in uniform or model language should be carefully considered. The Board's Report to the Court regarding the Standards mentioned the policies advanced by consistency in rules and standards, and the strong support of the Conference of Chief Justices for such consistency:

> First, there is value to the profession and its regulatory agencies in following a format widely adopted in other jurisdictions. One of the goals of the ABA Standards is to promote "consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions." ABA Standard, 1.3. In the Conference of Chief Justices' January 21, 1999 National Action Plan on Lawyer Conduct and Professionalism (CCJ Nat'l Action Plan), it is recommended that: "Disciplinary agencies should use available national standards to ensure interstate consistency of disciplinary sanctions." CCJ Nat'l Action Plan, § II, D, 3, p 35. The comment to that recommendation states that sanctions should be consistent "both within and across jurisdictions," and that "[t]he ABA Standards for Imposing Lawyer Sanctions provide criteria for evaluating the severity of conduct and imposing appropriate sanctions." *Id.*, p 36. [June 26, 2002 Report of the Attorney Discipline Board to the Michigan Supreme Court Regarding Proposed Michigan Standards for Imposing Lawyer Sanctions, p 5.]

The discussion regarding the recent "Ethics 2000" amendments to the ABA Model rules taking place in almost every jurisdiction has produced similar pleas for consistency. A June 25, 2003 memo to the members of the Conference of Chief Justices from Chief Justice Randall T. Shepard of Indiana and Chief Justice E. Norman Veasey of Delaware expressed their view that "the role of state supreme courts as formulators of ethics rules and regulators of the Bar is enhanced by as much uniformity as possible throughout the country." The justices continued by discouraging minor changes and urging that the rationale for other changes be set forth:

> Absolute uniformity is not likely, but it is desirable that there be as much uniformity as possible. We encourage each jurisdiction to adopt the format of the Model Rules and to have your review committees identify those areas that differ from the Model Rules, providing an analysis of the basis for the variation. Where only minor differences

> exist, there may be an opportunity to reconsider adopting the language of the Model Rules. Where significant differences exist, there will be an opportunity for the ABA and other review committees to learn from your committee's experience and analysis.

Similarly, the joint committee of the Illinois and Chicago bar associations, recently reporting on proposed changes to the Model Rules, wrote: "[t]he value of national uniformity and consistency in ethics rules is clear. The practice of law is no longer a purely local matter." Noting the work of the ABA Commission on Multijurisdictional Practice, and the fact that 30% of Illinois lawyers in 2002 were also admitted in another jurisdiction, the report concluded that "the ethics rules of Illinois will have an effect beyond the state's borders." That committee found that avoidance of confusion and unintended consequences were strong reasons for maintaining consistency with model language absent a significant policy difference:

> A third important rationale for following the ABA Model Rules absent a compelling reason is that amending well-known and commonly-used standard language will have consequences. At a minimum, unnecessary changes will cause confusion. Even minor stylistic amendments will inevitably cause lawyers consulting the Illinois Rules to speculate why the Illinois language was changed from the original ABA text. [Report of Illinois State Bar Association/Chicago Bar Association Joint Committee on Ethics 2000, pp 7-8.]

Finally, as a general proposition, it would seem to be preferable to add new standards to the end of a list (or to otherwise avoid unnecessary renumbering of the existing ABA Standards) so that references to Michigan standards are consistent with similar standards in the roughly 30 other jurisdictions that use a version of the ABA Standards. For example, the published standards add the "harm" factor at the top of the lists of aggravating and mitigating factors in Standards 9.22 and 9.32, thus throwing all of the factors which follow out of sync with the lettering sequence used in all other jurisdictions with standards patterned after the ABA's. Similar problems occur when a new standard is inserted where an ABA standard already exists (such as the published Alternative B Standard 4.5 on fees which displaces ABA Standard 4.5 on competence). If Michigan ultimately adopts a separate standard on fees, would it not be preferable to create a newly numbered Standard 4.7?

IV. SHOULD EACH STANDARD RECITE WHAT PURPORTS TO BE AN EXCLUSIVE LIST OF THE MRPC VIOLATIONS COVERED BY THAT STANDARD?

The standards published for comment incorporate a list of MRPC violations in each standard, indicating (or at least suggesting) that the particular standard applies only to those violations. This may be more than a cosmetic change and, it could have unintended consequences.

The ABA Standards do not set forth an exhaustive list in each standard of the Rules of Professional Conduct to which the standard applies. The ADB not only followed that approach but also recognized that the ABA Standards may have gaps. For that reason, the ADB inserted a footnote in the appendix (a cross-reference between the Rules and Standards) to provide for the orderly growth of the Standards and resolution of arguments about applicability.

Ease of reference is certainly an argument for referring to the applicable Rules of Professional Conduct in the prefatory language of a standard. However, an argument against such references is that the drafter (any drafter, no matter how learned) may miss something or foreclose a helpful application. While it is the Board's preference that rule references be omitted, another solution would be to insert the following underlined language in each standard: "The following sanctions are generally appropriate in cases involving [type of misconduct] including, but not limited to, conduct in violation of MRPC . . ."

V. CONCLUSION

This document and the more detailed comments attached do not exhaust the considerations relevant to the application of the proposed standards, especially those standards containing substantial deviations from the ABA Standards which the Board, the hearing panels, and other jurisdictions have employed since their publication in 1986.

In some instances, it is clear that modification or clarification of a particular standard was overdue and we believe the Board's proposals will help achieve the stated goal of assuring fairness, predictability and continuity in the imposition of sanctions. In other instances, the Board has raised questions about the intended or unintended consequences of departures form the language or structure of the existing standards.

The Board hopes that the attached documents containing more detailed comments to each of the published standards will be of assistance to the Court. We look forward to the opportunity to respond to the Court's further comments and questions.

Respectfully submitted,

By: _____

Theodore J. St. Antoine, Chairperson
Attorney Discipline Board

cc: Chief Justice Clifford W. Taylor, Michigan Supreme Court
Justices of the Michigan Supreme Court
Carl Ver Beek, Chairperson, Attorney Grievance Commission
Robert Agacinski, Grievance Administrator
John T. Berry, Executive Director, State Bar of Michigan
Donald D. Campbell, Collins Einhorn Farrell and Ulanoff

ADM FILE NO. 2002-29

Summary of Michigan Attorney Discipline Board Positions on Proposed Michigan Standards for Imposing Lawyer Sanctions Published by the Michigan Supreme Court for Comment

STANDARD PUBLISHED FOR COMMENT	ADB'S POSITION	
	Support	Oppose/Other
PREFACE		See Comment
DEFINITIONS		See Comment
1.1 PURPOSE OF LAWYER DISCIPLINE PROCEEDINGS	✔	
1.2 PUBLIC NATURE OF LAWYER DISCIPLINE		See Comment
1.3 PURPOSE OF THESE STANDARDS		See Comment
2.1 SCOPE	✔	
2.2 DISBARMENT	✔	
2.3 SUSPENSION	✔	
2.4 INTERIM SUSPENSION	✔	
2.5 REPRIMAND	✔	
2.6 ADMONITION		See Comment
2.7 PROBATION	✔	
2.8 OTHER SANCTIONS AND REMEDIES	✔	
2.9 RECIPROCAL DISCIPLINE	✔	
2.10 READMISSION AND REINSTATEMENT	✔	
3.0 GENERALLY		See Comment
3.1 APPLICATION OF STANDARDS	✔	
D. RECOMMENDED SANCTIONS	✔	
4.0 VIOLATIONS OF DUTIES OWED TO CLIENTS		
4.1 FAILURE TO PRESERVE PROPERTY HELD IN TRUST		See Comment
4.2 FAILURE TO PRESERVE THE CLIENT'S CONFIDENCES		See Comment
4.3 FAILURE TO AVOID CONFLICTS OF INTEREST		See Comment

STANDARD PUBLISHED FOR COMMENT		ADB'S POSITION	
		Support	Oppose/Other
	ALTERNATIVE A - PROPOSED STANDARD 4.4		See Comment
4.4	LACK OF DILIGENCE		
	ALTERNATIVE A - PROPOSED STANDARD 4.5		See Comment
4.5	LACK OF COMPETENCE		
	ALTERNATIVE B - PROPOSED STANDARD 4.4		See Comment
4.4	LACK OF DILIGENCE		
	ALTERNATIVE B - PROPOSED STANDARD 4.5		See Comment
4.5	CHARGING ILLEGAL OR CLEARLY EXCESSIVE FEES		
4.6	LACK OF CANDOR		See Comment
5.0	VIOLATIONS OF DUTIES OWED TO THE PUBLIC		
5.1	FAILURE TO MAINTAIN PERSONAL INTEGRITY		See Comment
5.2	FAILURE TO MAINTAIN THE PUBLIC TRUST		See Comment
6.0	VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM		
6.1	FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION		See Comment
6.2	ABUSE OF THE LEGAL PROCESS		See Comment
6.3	IMPROPER COMMUNICATIONS WITH INDIVIDUALS IN THE LEGAL SYSTEM		See Comment
7.0	VIOLATIONS OF DUTIES OWED TO THE PROFESSION		See Comment
8.0	PRACTICE OF LAW IN VIOLATION OF AN ORDER OF DISCIPLINE		See Comment
E.	AGGRAVATION AND MITIGATION		
9.1	GENERALLY	✔	
9.2	AGGRAVATION		See Comment
9.3	MITIGATION		See Comment
9.4	FACTORS WHICH ARE NEITHER AGGRAVATING NOR MITIGATING	✔	

ADM File No. 2002-29

MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS

Comments of the Attorney Discipline Board Regarding the Proposed Michigan Standards for Imposing Lawyer Sanctions

UNDER A SIDE-BY-SIDE COMPARISON OF THE PROPOSED STANDARDS PUBLISHED FOR COMMENT IN THE COURT'S JULY 29, 2003 ORDER, FILE NO. 2002-29,
WITH
THE ADB PROPOSED STANDARDS (SUBMITTED IN JUNE 2002)
AND
DONALD D. CAMPBELL'S RECOMMENDED STANDARDS [HEREINAFTER "ALTERNATIVE PROPOSAL"]
(SUBMITTED IN SEPTEMBER 2002)

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PREFACE

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
These Michigan Standards for Imposing Lawyer Sanctions were adopted by the Michigan Supreme Court on [date], and are intended for use by the Attorney Discipline Board and its hearing panels in imposing discipline following a finding or acknowledgment of professional misconduct. These standards may be amended or modified only by the Court.	These Michigan Standards for Imposing Lawyer Sanctions were adopted by the State of Michigan Attorney Discipline Board (ADB or Board) on [date] under the authority granted by the Michigan Supreme Court in its order dated [date], and are intended for use by the Attorney Discipline Board and its hearing panels in imposing discipline following a finding or acknowledgment of professional misconduct. Pursuant to the Court's order, these standards may be amended by the Board from time to time. The Court may at any time modify these standards or direct the Board to modify them.	These Michigan Standards for Imposing Lawyer Sanctions were adopted by the Michigan Supreme Court on [date], and are intended for use by the Attorney Discipline Board and its hearing panels in imposing discipline following a finding or acknowledgment of professional misconduct. These standards may be amended or modified only by the Court.

ADB Comment

Note: The Alternative Proposal was published.

Summary of ADB Position: The Board does not oppose the published version.

Discussion:

The preface proposed by the Board would have allowed it to adopt and modify the Standards. The Board proposed this, in part, because as the appellate tribunal interpreting and applying the standards most frequently, the Board believed it could best assure the continuing vitality and relevance of the Standards by having the authority to revise the Standards as improvements became apparent upon examination in light of specific cases. We recognize that it is quite common for a document like the Standards to be adopted by a jurisdiction's highest court, and that the Michigan Supreme Court has the "exclusive constitutional responsibility to supervise and discipline Michigan attorneys." MCR 9.110(A). However, in *Grievance Administrator v Lopatin*, 462 Mich 235; 612 NW2d 120 (2000), the Court mentioned that "[t]he ADB has not . . . adopted the ABA Standards or promulgated any other set of standards," 462 Mich at 241, thus implying that it might not be inappropriate for the Board to adopt standards.

The preface as published should not inhibit the appropriate growth and adaptation of the Standards. The Board can monitor the application of the Standards and propose revisions and additional sections to the Court from time to time. Accordingly, the Board does not oppose the published version.

DEFINITIONS

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The definitions contained in the Commentary to Rule 1.0 of the Michigan Rules of Professional Conduct (MRPC) and in Michigan Court Rule (MCR) 9.101 are incorporated by reference. "Intent" is the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure of a lawyer to exercise the degree of care that a reasonable lawyer would exercise in the situation.	"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury. "Intent" is the conscious objective or purpose to accomplish a particular result. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. "Negligence" is the failure of a lawyer to ~~heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard~~ exercise the degree of care that a reasonable lawyer would exercise in the situation. "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct~~, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct~~. The likelihood and gravity of the potential injury are factors to be considered in deciding the level of discipline.	The relevant definitions applicable to these standards are contained in Michigan Rules of Professional Conduct (MRPC) 1.0. "Suspension", as that term is used in these Standards, is defined under Standard 2.3 below.

ADB Comment

Note: The published version differs from both the ADB and the Alternative proposals. The published section deletes the definitions of "injury," "knowledge," and "potential injury." It adds, by incorporation, the definitions in the commentary to MRPC 1.0 and MCR 9.101.

Summary of ADB Position:

A. The ADB strongly recommends that the fundamental framework of the ABA standards be restored so that injury and potential injury are considered in Section D of the proposed standards, rather than at the aggravation/mitigation stage of the sanctions analysis. Accordingly, the ADB's proposed definitions of "injury" and "potential injury" should be restored to the definitions section.

B. The ABA definition of "knowledge" should be adopted, even if slightly modified (see below). The case has not been made for departing from the definition in the ABA Standards and adopting the definition in the commentary to MRPC 1.0. Irrespective of its content, the definition of "know" and its variations should be set forth in the Standards.

comment continued . . .

Discussion:

A. "Injury" & "Potential Injury"

The definitions of "injury" and "potential injury" should be restored and, as the Board has commented above, these factors should be considered in Section D (the initial sanctions recommendations) rather than at the aggravation/mitigation stage. The definition of "potential injury," will make explicit the notion that misconduct's potential for injury may be a factor even if no actual harm occurred. The role of injury is discussed in more detail in the ADB's letter dated January 26, 2005, attached to these comments, and in the comments to published Standard 3.0.

II. "Knowledge"

A variation of the word "know" appears approximately 35 times in the Court's published standards, almost always in contrast to conduct deemed "intentional" or conduct labeled "negligent." If panels are to accurately apply the Standards, and if the Standards are to afford meaningful guidance by helping to sort acts of misconduct into varying degrees of seriousness, overlap between mental states should be minimized. The ABA definitions of "intent," "knowledge," and "negligence" seek to establish clear boundaries between the relevant mental states of a lawyer. These definitions are employed in other jurisdictions using the Standards and should be retained in Michigan.

The ABA Standards contain this definition:

> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

The published standards would incorporate by reference the following definition in the "terminology" section of the comment to MRPC 1.0:

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

The comment to the Alternative Proposal states:

> The definitions for "intent" and "knowledge" in the ADB's proposed Standards cannot be squared with the definitions of "knowingly", "known", or "knows" in MRPC 1.0.

This seems an overstatement. There is no elaboration to explain how any differences between the definitions will cause problems in arriving at a sanction based, in part, on a lawyer's state of mind. Certainly no irreconcilable clash has been illustrated. Many states work with both the ABA Standards and rules of professional conduct based on the ABA Model Rules. The Board is not aware of any difficulty occasioned by the different terminology.

In an effort to distinguish between pertinent mental states, the ABA definition of "knowledge" excludes intentional acts. Perhaps this definition could be clarified as follows:

> "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but ~~without~~ need not include the conscious objective or purpose to accomplish a particular result.

comment continued . . .

This recognizes that knowing and intentional conduct are closely related but indeed still different in some cases. If the ABA definitions are retained, the Board would likely draft a comment to this section stating that if the conscious objective or purpose to accomplish a particular result exists, then the standard referring to "intentional" conduct should be applied instead of the standard referring to knowing conduct. This is consistent with the Board's Drafting Notes to the standards originally proposed:

> The commentary [to Standard 3.1] may also contain a statement to the effect that one must select the highest applicable recommended sanction as a starting point for the analysis (and give an illustration, e.g., if all of the elements of 4.11 apply, the adjudicator should start with 4.11 not something lower like 4.12).

The Board recommends against using MRPC 1.0's definition of "knowledge" instead of the definition in the ABA Standards. The MRPC 1.0 definition could lead to unintended consequences and may in fact relax the standard to which lawyers are held. The heart of the definition in the comment to MRPC 1.0 is "actual knowledge of the fact in question." In contrast, the ABA/Board definition turns mainly on the phrase "conscious awareness of the nature or attendant circumstances of the conduct." The "actual knowledge" standard may turn out to be more difficult to prove and, therefore, less protective of the public interest than one which focuses on the lawyer's awareness of the conduct.

Also, the statement, in MRPC 1.0's comment, that "a person's knowledge may be inferred from circumstances," probably states what most attorneys expect already. More importantly, if such a statement appears *only* in the definition of "knowledge," the definitions of "intent" and "negligence" might be read to prohibit such inferences in determinations as to whether those mental states exist. This would, again, make it more difficult to prove a state of mind. In sum, mixing and matching definitions (some from the court rules, some from the Standards) is a recipe for ambiguity and unintended applications. No showing as to the inadequacy of the ABA Standards' definition of "knowledge" has been made.

Finally, although the published standards would contain a definition of "knowingly," "known," or "knows" by incorporating the definition from the comment to MRPC 1.0, it would be preferable to have such an integral definition in the "definitions"section of the Standards. Panels will refer to these definitions to draw distinctions. None of the other definitions in MRPC 1.0 and MCR 9.101 are likely to be consulted in the discipline phase of a hearing. As a practical matter, this important definition should appear between the definitions of "intent" and "negligence."

As we have stated elsewhere, the benefits of following the ABA Standards that are used in many other states generally outweigh the costs of variance. In the absence of clear and compelling reasons for modification, the Board recommends following the terminology of the ABA Standards.

A. Purpose and Nature of Sanctions

1.1 PURPOSE OF LAWYER DISCIPLINE PROCEEDINGS

Supreme Court (Published for Comment July 29, 2003)	**Attorney Discipline Board** (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** (Submitted September 2002)
The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.	The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.	Discipline for misconduct is not intended as punishment for wrongdoing, but for the protection of the public, the courts, and the legal profession.

ADB Comment

Note: The ADB proposal was published.

ADB Position: The Board supports the published version.

A. Purpose and Nature of Sanctions

1.2 PUBLIC NATURE OF LAWYER DISCIPLINE

Supreme Court (Published for Comment July 29, 2003)	**Attorney Discipline Board** (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** (Submitted September 2002)
Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.	Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.	[Reserved]

ADB Comment

Note: The ADB proposal was published.

ADB Position: The Board supports the published version in part.

Discussion:

Upon further reflection, the Board recommends deletion of the second sentence. As is discussed also in our comment to Published Standard 2.6, *infra*, Michigan does not provide for "private discipline." Accordingly, the Board now proposes that Standard 1.2 read as follows:

> Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. ~~Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.~~

A. Purpose and Nature of Sanctions

1.3 PURPOSE OF THESE STANDARDS

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
These standards are designed for use in imposing a sanction or sanctions following the entry of a finding of misconduct pursuant to MCR 9.115(J)(1). These Standards are designed to promote fairness, predictability, and continuity in the imposition of sanctions. They are also designed to provide a focus for appellate challenges concerning the appropriate level of discipline imposed upon a lawyer.	These standards are designed for use in imposing a sanction or sanctions following a determination by ~~clear and convincing~~ a preponderance of the evidence or acknowledgment that a member of the legal profession has violated a provision of the ~~Model~~ Michigan Rules of Professional Conduct or subchapter 9.100 of the Michigan Court Rules. Descriptions in these standards of substantive disciplinary offenses are not intended to create independent grounds for determining culpability ~~independent of the Model Rules~~. These Standards ~~constitute a model, setting forth a comprehensive system for determining sanctions,~~ are designed to permit~~ting~~ flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct~~. They are designed to~~ while also promote~~e~~ing: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and, (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses ~~within and among jurisdictions~~.	These standards are designed for use in imposing a sanction or sanctions following the entry of a finding of misconduct pursuant to MCR 9.115(J)(1). These Standards are designed to promote fairness, predictability, and continuity in the imposition of sanctions. They are also designed to provide a focus for appellate challenges concerning the appropriate level of discipline imposed upon a lawyer.

ADB Comment

Note: The Alternative Proposal was published.

Summary of ADB Position: The ADB proposes that the following revised Standard 1.3, based in part on the published/Alternative Proposal versions and in part on the ADB proposal, should be adopted:

> These standards are designed for use in imposing a sanction or sanctions following a determination by a preponderance of the evidence or acknowledgment that a member of the legal profession has violated a provision of the Michigan Rules of Professional Conduct or subchapter 9.100 of the Michigan Court Rules. Descriptions of misconduct in these standards do not create independent grounds for discipline. These Standards are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and, (3) consistency, fairness, and predictability in the imposition of disciplinary sanctions for the same or similar offenses.

Discussion:

This standard sets forth the purposes of the Standards for Imposing Lawyer Sanctions and, as such, touches upon several important issues. Accordingly, the Board offers this extended comment regarding each of the three sentences in the standard. The Board feels strongly that its revised standard (proposed above) sets forth most appropriately the objectives of the Standards.

comment continued . . .

I. First Sentence: The ADB's proposed first sentence more accurately conveys the scope and coverage of the Standards. The published version might be viewed as providing that the Standards apply only to contested cases and not to discipline by consent under MCR 9.115(F)(5). This would undermine the goals of a set of standards. Consent discipline orders represent nearly 50% of the orders imposing discipline. Exempting them would threaten to reduce the application of the standards in the remaining (contested) cases to a futile gesture. For the reasons more fully set forth in the Board's June 26, 2002 Report and Drafting Notes to Standard 1.3, the Board respectfully urges adoption of its proposed first sentence.

II. Second Sentence: The comment to the Alternative Proposal states that certain standards "criminalize" conduct. The Standards can do no such thing. The Rules of Professional Conduct "define proper conduct for purposes of professional discipline." Comment, Rule 1.0 (see also, MRPC 1.0(b) and (c), MRPC 8.4(a), and MCR 9.104(4)). As the ADB's proposed Standard 1.3 made absolutely clear, the Standards apply only after such a finding and do not "create independent grounds for determining culpability." The quoted language was dropped from the published standard. The Board believes that such a statement belongs in Standard 1.3, and, upon further reflection, recommends that the second sentence be rewritten as follows:

> Descriptions of misconduct in these standards do not create independent grounds for discipline.

III. Third Sentence: The Board suggests a modified third sentence (see section D below), borrowing elements from both the Alternative Proposal and ADB versions.

A. Background. In *Grievance Administrator v Lopatin*, 462 Mich 235, 246-247; 612 NW2d 120 (2000), the Court stated:

> The ABA standards will guide hearing panels and the ADB in imposing a level of discipline that takes into account the unique circumstances of the individual case, but still falls within broad constraints designed to ensure consistency.
>
> Standards for imposing lawyer sanctions will help insure that the sanction imposed in a given case advances the basic goal of our disciplinary system. We agree with the remarks contained in the preface to the ABA standards:
>
> > For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

comment continued . . .

> Use of the ABA standards will further the goal of our disciplinary system because they "combine clear, straight-forward guidelines which ensure a level of consistency necessary for fairness to the public and the legal system with the flexibility and creativity essential to secure justice to the disciplined lawyer." *In re Buckalew*, 731 P.2d 48, 52 (Alas, 1986).

B. "Flexibility and Creativity." When the Board retained this phrase from the ABA Standards, we intended to encourage consideration and use of conditions such as: monitoring and mentoring arrangements which have been ordered for certain competence, law office management, and other problems; monitoring under the Lawyers and Judges Assistance Program agreements; other forms of continued treatment or participation in programs; maintenance of professional liability insurance under certain circumstances; attendance at certain courses (such as ICLE, or the State Bar's "Ethics School"); and, other "creative" and "flexible" conditions designed to protect the public. We suspect that the Court meant something like this when it quoted that language approvingly. Perhaps, however, inclusion of the phrase doesn't quite strike the right balance between the various factors at play in imposing discipline. Accordingly, the Board has offered an alternative formulation below.

C. "Focus for Appellate Challenges." While this could be a beneficial side effect of standards, the Board does not believe that it is a purpose which needs to be ranked among the others here. Not every case is appealed, and not every appeal involves the level of discipline or the Standards.

D. Proposed Modified Third Sentence. The ADB respectfully proposes that the third sentence of Standard 1.3 read as follows:

> These Standards are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and, (3) consistency, fairness, and predictability in the imposition of disciplinary sanctions for the same or similar offenses.

This revised third sentence borrows from both the published/Alternative Proposal version and the ADB/ABA version. Reference to these points is important to most accurately describe the process. First, the Standards *are* an attempt to delineate factors relevant to imposing discipline, and this should be a stated purpose. Moreover, reference to this purpose aligns well with footnote thirteen of *Grievance Administrator v Lopatin*, which reads:

> We caution the ADB and hearing panels that our directive to follow the ABA standards is not an instruction to abdicate their responsibility to exercise independent judgment. Where, for articulated reasons, the ADB or a hearing panel determines that the ABA standards do not adequately consider the effects of certain misconduct, do not accurately address the aggravating or mitigating circumstances of a particular case, or do not comport with the precedent of this Court or the ADB, it is incumbent on the ADB or the hearing panel to arrive at, and explain the basis for, a sanction or result that reflects this conclusion. [*Lopatin*, 462 Mich at 248 n 13.]

comment continued . . .

With regard to the second point, assigning the appropriate weight to aggravating and mitigating factors is critical to the imposition of appropriate sanctions. There are times when a particular factor assumes greater or lesser importance in the sanctions determination, depending on the nature of the offense and other factors or circumstances. (See Drafting Note to ADB proposed Standards 9.2 and 9.3.) For example, an unblemished record should ordinarily do little to mitigate the sanction for knowing conversion of client funds. This critical function should be reflected in a statement of the standards' purposes.

Finally, the third stated purpose of the standards is drawn from the published/Alternative proposal, except that "consistency" is used in lieu of "continuity."

B. Sanctions and Other Consequences for Misconduct

2.1 SCOPE

Supreme Court (Published for Comment July 29, 2003)	**Attorney Discipline Board** (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** (Submitted September 2002)
A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer has engaged in professional misconduct.	A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer has engaged in professional misconduct.	A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer has engaged in professional misconduct.

ADB Comment

Note: The three versions are identical.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.2 DISBARMENT

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
Disbarment means revocation of the license to practice law. An attorney whose license to practice law has been revoked may petition for reinstatement under MCR 9.124, but may not do so until at least 5 years have elapsed since revocation of the license. Eligibility for reinstatement is determined under MCR 9.123, which requires a disbarred attorney to establish by clear and convincing evidence the elements of MCR 9.123(B) and requires recertification by the Board of Law Examiners.	Disbarment ~~terminates the individual's status as a lawyer~~ means revocation of the license to practice law. ~~Where disbarment is not permanent, procedures should be established for a lawyer who has been disbarred to apply for readmission, provided that:~~ ~~(1) no application should be considered for five years from the effective date of disbarment; and~~ ~~(2) the petitioner must show by clear and convincing evidence:~~ ~~(a) successful completion of the bar examination, and~~ ~~(b) rehabilitation and fitness to practice law.~~ An attorney whose license to practice law has been revoked may petition for reinstatement under MCR 9.124 but may not do so until 5 years have elapsed since revocation of the license. Eligibility for reinstatement is determined under MCR 9.123, which requires a disbarred attorney to establish by clear and convincing evidence the elements of MCR 9.123(B) and requires recertification by the Board of Law Examiners.	Disbarment means revocation of the license to practice law. An attorney whose license to practice law has been revoked may petition for reinstatement under MCR 9.124 but may not do so until at least 5 years have elapsed since revocation of the license. Eligibility for reinstatement is determined under MCR 9.123, which requires a disbarred attorney to establish by clear and convincing evidence the elements of MCR 9.123(B) and requires recertification by the Board of Law Examiners.

ADB Comment

Note: The Alternative Proposal was published. It adds to the ADB proposal the words "at least" where emphasized above.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.3 SUSPENSION

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
Suspension is the removal of a lawyer from the practice of law for not less than 30 days. See MCR 9.106(2). An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.	Suspension is the removal of a lawyer from the practice of law for ~~a specified minimum period of time~~ not less than 30 days. See MCR 9.106(2). ~~Generally, suspension should be for a period of time equal to or greater titan six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation and fitness to practice law.~~ An attorney suspended for 180 days or more is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124, has established by clear and convincing evidence the elements of MCR 9.123(B), and has complied with other applicable provisions of MCR 9.123.	Suspension, as that term is used in these Standards, means the loss of the privilege to practice law for a term of no less than 180 days and until the lawyer is reinstated under MCR 9.124.

ADB Comment

Note: The ADB proposal was published.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.4 INTERIM SUSPENSION

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:	Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:	Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:
(a) automatic suspension upon conviction of a felony (MCR 9.120[B]) or,	(a) automatic suspension upon conviction of a ~~"serious crime"~~ felony (MCR 9.120(B)) or,	(a) automatic suspension upon conviction of a felony (MCR 9.120(B)) or,
(b) suspension of a lawyer who fails to comply with the lawful order of a hearing panel, the Board, or the Supreme Court (MCR 9.127[A]).	(b) suspension ~~when the~~ of a lawyer~~'s continuing conduct is or is likely to cause immediate and serious injury to a client or the public~~ who fails to comply with the lawful order of a hearing panel, the Board or the Supreme Court (MCR 9.127(A)).	(b) suspension of a lawyer who fails to comply with the lawful order of a hearing panel, the Board or the Supreme Court (MCR 9.127(A)).

ADB Comment

Note: The three versions are identical.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.5 REPRIMAND

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
Reprimand is a form of public discipline that declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.	Reprimand~~, also known as censure or public censure,~~ is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.	Reprimand is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

ADB Comment

Note: The three versions are identical.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.6 ADMONITION

Supreme Court (Published for Comment July 29, 2003)	**Attorney Discipline Board** (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** (Submitted September 2002)
Admonition, also known as private reprimand, is a form of nonpublic discipline that declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.	[Reserved] ~~Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.~~	[Reserved]

ADB Comment

Note: The published version is identical to Standard 2.6 of the ABA Standards.

ADB Position: The Board recommends changes to the published version clarifying that MCR 9.106(6) is not modified.

Discussion:

Neither the ADB nor the Alternative Proposal included the definition of admonition drawn from the ABA Standards and published by the Court. If a definition is to be set forth in Standard 2.6, the ADB recommends that the Court adopt language consistent with MCR 9.106(6) which provides that an admonition is not discipline and may only be imposed by the Attorney Grievance Commission. Perhaps language such as this would serve the purpose:

> An attorney may be admonished by the Attorney Grievance Commission in accordance with MCR 9.106(6). An admonition is a conclusion by the Attorney Grievance Commission that a lawyer has committed misconduct, but it does not constitute discipline. Accordingly, these standards do not contain recommendations regarding admonitions.

The ABA definition is generic. Its reference to "nonpublic discipline" is confusing, and, to the extent that it suggests that a panel, the Board or the Court could impose such discipline, it is inconsistent with the open nature of the discipline system following the filing of a formal complaint. See MCR 9.126(C).

B. Sanctions and Other Consequences for Misconduct

2.7 PROBATION

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
Probation is a sanction that may be imposed upon an impaired lawyer as set forth in MCR 9.121(C).	Probation is a sanction ~~that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement~~ which may be imposed upon an impaired lawyer as set forth in MCR 9.121(C).	Probation is a sanction which may be imposed upon an impaired lawyer as set forth in MCR 9.121(C).

ADB Comment

Note: The three versions are identical.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.8 OTHER SANCTIONS AND REMEDIES

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
Other sanctions and remedies that may be imposed include: (a) restitution; (b) transfer of an incompetent or incapacitated attorney to inactive status (MCR 9.121[A] and [B]);[1] or (c) such conditions relevant to the established misconduct as a hearing panel, the Board, or the Supreme Court deems consistent with the purposes of lawyer sanctions. [1] An attorney may be ordered transferred to inactive status under MCR 9.121(A) and (B) without a finding of misconduct.	Other sanctions and remedies which may be imposed include: (a) restitution~~;~~ ; (b) ~~assessment of costs~~ transfer of an incompetent or incapacitated attorney to inactive status (MCR 9.121(A)&(B))[1]~~;~~ ; (c) ~~limitation upon practice~~ such conditions relevant to the established misconduct as a hearing panel, the Board, or the Supreme Court deems consistent with the purposes of lawyer sanctions ~~(d) appointment of a receiver,~~ ~~(e) requirement that the lawyer take the bar examination or professional responsibility examination,~~ ~~(f) requirement that the lawyer attend continuing education courses, and~~ ~~(g) other requirement that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions~~. [1] An attorney may be ordered transferred to inactive status under MCR 9.121(A) and (B) without a finding of misconduct.	Other sanctions and remedies which may be imposed include: (a) restitution; (b) transfer of an incompetent or incapacitated attorney to inactive status (MCR 9.121(A)&(B))[1]; or (c) such conditions relevant to the established misconduct as a hearing panel, the Board, or the Supreme Court deems consistent with the purposes of lawyer sanctions. [1] An attorney may be ordered transferred to inactive status under MCR 9.121(A) and (B) without a finding of misconduct.

ADB Comment

Note: The three versions are identical.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.9 RECIPROCAL DISCIPLINE

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate. MCR 9.104(B).	Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate. MCR 9.104(B).	Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction. The only issues to be addressed in the Michigan proceeding are whether the respondent was afforded due process of law in the course of the original proceedings and whether imposition of identical discipline in Michigan would be clearly inappropriate. MCR 9.104(B).

ADB Comment

Note: The three versions are identical.

ADB Position: The Board supports the published version.

B. Sanctions and Other Consequences for Misconduct

2.10 READMISSION AND REINSTATEMENT

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
[DELETED]	~~In jurisdictions where disbarment is not permanent, procedures should be established to allow a disbarred lawyer to apply for readmission. Procedures should be established to allow a suspended lawyer to apply for reinstatement.~~	[DELETED]

ADB Comment

Note: The published standards, the ADB proposal, and the Alternative Proposal all deleted Standard 2.10 of the ABA Standards.

ADB Position: The Board supports the published version.

C. Factors to Be Considered in Imposing Sanctions

3.0 GENERALLY

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
In imposing a sanction after a finding or acknowledgment of lawyer misconduct, the Board and hearing panels should consider the following factors: (a) the nature of the misconduct; (b) the lawyer's mental state; (c) the circumstances of the misconduct, including the existence of aggravating or mitigating factors; and (d) the precedent of the Court and the Board.	In imposing a sanction after a finding or acknowledgment of lawyer misconduct, ~~a court~~ the Board and hearing panels should consider the following factors: (a) the ~~duty violated~~ nature of the misconduct; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; ~~and~~ (d) the circumstances of the misconduct, including the existence of aggravating or mitigating factors; and (e) precedent of the Court and the Board.	In imposing a sanction after a finding or acknowledgment of lawyer misconduct, the Board and hearing panels should consider the following factors: (a) the nature of the misconduct; (b) the lawyer's mental state; and, (c) the existence of relevant aggravating or mitigating factors.

ADB Comment

Note: The ADB proposal was published, except for the factor (c) (injury or potential injury). As recommended in the Alternative Proposal, this factor was moved to Standards 9.22 (aggravation) and 9.32 (mitigation).

Summary of ADB Position: The ADB supports adoption of the published standard with re-insertion of the ADB's proposed factor (c) (potential or actual injury caused by the lawyer's misconduct). The ADB also urges that the injury/potential injury factor be restored to Section D's various standards.

Discussion:

I. Introduction & Overview.

The ADB proposed deletion of the injury factor from two Standards relating to handling of client property (4.11 and 4.12) and that the degree of injury be considered for these two offenses in the aggravation/mitigation phase of the analysis. Perhaps this prompted the Alternative Proposal and the published standards to apply this approach across the board and strike injury from Standard 3.0 and the standards contained in Section D. This, the ADB believes, would be a mistake. The factor serves as a useful part of the matrix that yields an initial sanctions recommendation.

"Potential injury" and actual "injury" should be listed as relevant factors in imposing discipline. These terms are defined broadly in the ADB's proposed standards. "Injury" includes "harm to a client, the public, the legal system, or the profession" (see "Definitions" *supra*). The ADB also proposed a definition of "potential injury" that departed from the ABA's definition suggesting that there need be a probability of injury and instead substituted a risk analysis. These definitions are broad enough to ensure that consideration of actual and potential injury as factors in sanctions determinations will foster distinction and articulation in each case but will not (as they have not) result in discipline that is too lenient or unduly focused on the absence of actual harm to a client.

comment continued . . .

Indeed, after reviewing the published standards and reconsidering the important role of injury and potential injury, the ADB suggests that partial restoration of the injury factor in Standards 4.11 and 4.12 may be appropriate.

II. Background – Structure & Application of the Standards; Role of "Injury."

ABA Standards 4.0 – 8.0 recommend "generally appropriate" sanctions for specific types of misconduct based upon consideration of (a) the duty violated, (b) the lawyer's mental state, and (c) the potential or actual injury caused by the lawyer's misconduct. Aggravating and mitigating factors are then to be considered after the initial sorting process in Standards 4.0 through 8.0. Under the ABA Standards, application of the "duty violated" factor would seem to be simply a question of selecting the pertinent heading (e.g., 4.0 Violations of Duties Owed to Clients), and the proper subheading (e.g., 4.2 Failure to Preserve the Client's Confidences). This process is aided by the appendix (an index cross-referenced to the MRPC). The next step is choosing the applicable standard from among the four listed under the pertinent subheading, e.g., 4.2, under which one finds the following standards: 4.21 (disbarment), 4.22 (suspension), 4.23 (reprimand), or 4.24 (admonition). The two factors recited in these subordinate standards (e.g., 4.11) are the lawyer's mental state and injury. "Solely focusing on the intent of the lawyer is not sufficient, and *proposed standards must also consider the damage which the lawyer's conduct causes to the client, the public, the legal system, and the profession*." (ABA Standards, Methodology, p 3; emphasis added.) So, for example, under ABA Standard 4.11, "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."

The ADB's proposed standards changed "duty violated" to "nature of the misconduct" but otherwise retained the ABA structure and headings for the most part. The published standards carry over the ADB nomenclature. Thus, the ADB proposal, the published standards, the ABA Standards, and the Alternative Proposal all seek to initially array lawyer misconduct in a hierarchy of recommended sanctions. The ADB proposed standards do this based on (1) the nature of the misconduct, (2) the lawyer's mental state, and (3) the degree of harm. These factors have been combined and balanced to produce recommended sanctions.

III. Injury in the Published and ADB Proposed Standards.

The factor of injury (including potential injury) was dropped from the ADB's proposed Standards 4.11 and 4.12 for reasons stated in the Drafting Notes to proposed Standard 4.1. Injury was otherwise retained in the ADB's proposed Standards 4.0 - 8.0 (labeled section "D. Recommended Sanctions").

By contrast, injury was entirely removed from Section D of the published Standards, and definitions of "injury" and "potential injury" were deleted. The published Standards follow the Alternative Proposal's recommendation and include an aggravating factor, Standard 9.22(a), the "degree of harm to a client, opposing party, the bar, bench, or public," and a mitigating factor, Standard 9.32(a), the "absence of any degree of harm to a client, opposing party, the bar, bench, or public."

Published Standard 9.32(a) is quite restrictive. There must be an absence of any degree of harm for this factor to be taken into account. It may be useful for panels, the Board and the Court to consider, in some cases, and distinguish minor harm (or the remote potential for injury) from greater actual or potential harm in other cases. Can it truly be said at this point that such distinctions will be irrelevant in all cases?

comment continued . . .

IV. Injury/potential Injury Should Be Part of the Initial Sorting Process Conducted in Section D of the Standards.

Perusal of Section D's subordinate standards, i.e., those with two numerals to right of the decimal point (e.g., 4.12) demonstrates how the factor of injury, or potential injury, is plugged into a matrix which is calibrated to yield an initial recommendation as to the level of discipline generally appropriate for a particular disciplinary offense. While several of the standards reflect escalating levels of pertinent factors (e.g., intent or injury), it is significant that the most serious sanction does not always require "serious" injury. In some instances, the nature of the conduct itself may be so serious that a recommendation of disbarment may be triggered without a finding of "serious injury." For example, where there is knowing conversion of client funds, disbarment is generally appropriate under the ABA Standards even if the actual or potential injury does not reach the level of "serious."

After the initial sorting process which results from application of Standards 4.0 – 8.0, hearing panels then consider aggravating and mitigating factors (see Standards 9.2 and 9.3). The aggravating and mitigating factors listed in Standard 9 are not present in this initial sorting process partly because they are less often determinative. That is, the nature of the offense, mental state and injury seem to be relevant in more cases than are the factors listed in 9.2 and 9.3.

Injury has been woven into the initial recommendation matrix of the ABA Standards. It should not be lightly extracted. In several places the injury factor has been weighted (e.g., serious, less serious, little or no) and combined with other factors in a way which helps an adjudicator sort cases. Why unmoor it and relegate it to a list of unweighted factors? It is important to note that even under the published standards injury is simply moved, not *re*moved. It is moved from Standards 4.0 – 8.0 to Standards 9.2 and 9.3. Thus, panels and the Board would still consider the factor, but instead of having the structure provided by the ADB/ABA matrix, use of this factor will be relatively unguided. True, decisional law can and must supplement the standards to explain how and when various factors are relevant in mitigation and to what degree. But, why start at ground zero?

The ABA Standards, in a section entitled "Theoretical Framework," at p 6, explain the application of the injury factor in hypothetical cases involving failure to segregate client funds:

> The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm. For example, in a conversion case, the injury is determined by examining the extent of the client's actual or potential loss. In a case where a lawyer tampers with a witness, the injury is measured by evaluating the level of interference or potential interference with the legal proceeding. In this model, the standards refer to various levels of injury: "serious injury," "injury," and "little or no injury." A reference to "injury" alone indicates any level of injury greater than "little or no" injury.
>
> As an example of how this model works, consider two cases of conversion of a client's property. After concluding that the lawyers engaged in ethical misconduct, it is necessary to determine what duties were breached. In these cases, each lawyer breached the duty of loyalty owed to clients. To assign a sanction, however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyers' actions.
>
> In the first case, assume that the client gave the lawyer $100 as an advance against the costs of investigation. The lawyer took the money, deposited it in a personal checking account, and used it for personal expenses. In this case, where the lawyer acted intentionally and the client actually suffered an injury, the most severe sanction - disbarment - would be appropriate.

comment continued . . .

> Contrast this with the case of a second lawyer, whose client delivered $100 to be held in a trust account. The lawyer, in a hurry to get to court, neglected to inform the secretary what to do with these funds and they were erroneously deposited into the lawyer's general office account. When the lawyer needed additional funds he drew against the general account. The lawyer discovered the mistake, and immediately replaced the money. In this case, where there was no actual injury and a potential for only minor injury, and where the lawyer was merely negligent, a less serious sanction should be imposed. The appropriate sanction would be either reprimand or admonition.

In addition to the hypothetical situations presented in the foregoing quotation from the ABA Standards' Theoretical Framework, another could be posed. Consider a lawyer who is given a $1000 retainer in cash at a meeting with a client. It is not nonrefundable. He has no other cash in his wallet, and it is lunch time and he goes to a restaurant that does not accept credit cards (which he learns after eating). He pays for his lunch and replenishes the funds later that afternoon. He has knowingly converted client funds. Isn't this different than a lawyer who cleans out his trust account and goes to Rio? Isn't injury the distinguishing factor?

In its Drafting Notes to proposed Standard 4.1 the ADB expressed concern that ABA Standard 4.1's focus on injury to "the client" and the ABA definition of potential injury could conspire to undermine Michigan's strong misappropriation precedents. Perhaps this concern was overstated in light of the ADB's proposed definition and deletion of the injury factor in Standard 4.11 and 4.12. The ADB *did* suggest that injury or the lack thereof could be considered in Standards 9.2 and 9.3. However, upon further reflection, the Board suggests the possible and partial restoration of injury as a factor in its proposed Standards 4.11 and 4.12 (reinserting the language "and causes injury or potential injury," but not the language "to a client"). This modification, together with the ABA's broad definition of "injury" and the ADB's proposed definition of "potential injury" will guard against diminution of sanctions in this area.

After reviewing the standards again in light of the published proposals, the ADB is now even more convinced that the injury/potential injury factors in Standards 4.0 - 8.0 are useful, and in some instances critical, to the initial determination of discipline as envisioned in the ABA Standards and should remain in the corresponding Michigan Standards.

V. Concern That Considering Injury in Section D of the Standards Will Elevate Injury to the Status of an "Element" of a Disciplinary Offense.

This concern confuses the different roles of the Rules of Professional Conduct, which define misconduct, and the Standards, which help to sort and rank established misconduct into categories ranging from those acts warranting the most serious sanction to those warranting the least severe sanction. A proper interpretation of the factors of injury and potential injury will prevent any confusion on this score. The Board and panels have been applying the ABA Standards since 1986, and more consistently since June 2000, and the Board is not aware of a case in which it has been claimed that application of the injury factor resulted in an inappropriate sanction.

C. Factors to Be Considered in Imposing Sanctions

3.1 APPLICATION OF STANDARDS

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
In considering the foregoing factors and applying these standards, hearing panels, the Board, and others should: (a) Consult Appendix 1 (Cross-Reference Table: Michigan Rules of Professional Conduct and Standards for Imposing Lawyer Sanctions) and locate the rule violated and a reference to the pertinent standard in Section D; (b) determine which of the factors present in the pertinent standard apply, and select the appropriate recommended sanction; (c) consider whether the recommendation adequately addresses the nature or effects of the misconduct, and articulate any basis for selecting an alternative sanction as a baseline; (d) refer to the commentary and precedent to refine the recommendation; and (e) consider aggravating and mitigating factors (see Section E).	In considering the foregoing factors and applying these standards, hearing panels, the Board, and others should: I. Consult Appendix 1 (Cross-Reference Table: Michigan Rules of Professional Conduct and Standards for Imposing Sanctions) and locate the rule violated and a reference to the pertinent standard in Section D; II. determine which of the factors present in the pertinent standard apply, and select the appropriate recommended sanction; III. consider whether the recommendation adequately addresses the nature or effects of the misconduct, and articulate any basis for selecting an alternative sanction as a baseline; IV. refer to the commentary and precedent to refine the recommendation; and, V. consider aggravating and mitigating factors (see Section E).	In considering the foregoing factors and applying these standards, hearing panels, the Board, and others should: (a) Consult Appendix 1 (Cross-Reference Table: Michigan Rules of Professional Conduct and Standards for Imposing Sanctions) and locate the rule violated and a reference to the pertinent standard in Section D; (b) determine which of the factors present in the pertinent standard apply, and select the appropriate recommended sanction; (c) consider whether the recommendation adequately addresses the nature or effects of the misconduct, and articulate any basis for selecting an alternative sanction as a baseline; and, (d) consider aggravating and mitigating factors (see Section E).

ADB Comment

Note: The ADB proposal was published.

ADB Position: The Board supports the published version.

D. RECOMMENDED SANCTIONS

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The recommended sanctions in the following standards take into account the factors set forth in Standard 3.0 and are generally appropriate for the types of misconduct specified, absent aggravating or mitigating circumstances.	The recommended sanctions in the following standards take into account the factors set forth in Standard 3.0 and are generally appropriate for the types of misconduct specified, absent aggravating or mitigating circumstances.	The recommended sanctions in the following standards take into account the factors set forth in Standard 3.0 and are generally appropriate for the types of misconduct specified, absent aggravating or mitigating circumstances.

ADB Comment

Note: The three versions are identical. This section heading and the text are not present in the ABA Standards; they were drafted by the ADB.

ADB Position: The Board supports the published version.

4.1 FAILURE TO PRESERVE PROPERTY HELD IN TRUST

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The following sanctions are generally appropriate in cases involving the failure to preserve property held in trust in violation of MRPC 1.15: 4.11 Disbarment is generally appropriate when a lawyer knowingly fails to preserve property held in trust. 4.12 Suspension is generally appropriate when a lawyer fails to hold property in trust or commingles personal property with property that should have been held in trust. 4.13 Reprimand is generally appropriate when a lawyer, in an isolated instance, negligently fails to preserve property held in trust.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving the failure to preserve client property: 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property ~~and causes injury or potential injury to a client~~. 4.12 Suspension is generally appropriate when a lawyer ~~knows or should know that he is dealing~~ knowingly or negligently deals improperly with client property ~~and causes injury or potential injury to a client~~. 4.13 Reprimand is generally appropriate when a lawyer ~~is negligent~~ engages in an isolated instance of simple negligence in dealing with client property and causes little or no injury or potential injury to a client.	The following sanctions are generally appropriate in cases involving the failure to preserve property held in trust in violation of MRPC 1.15: 4.1 Disbarment is generally appropriate when a lawyer knowingly fails to preserve property held in trust. 4.12 Suspension is generally appropriate when a lawyer fails to hold property in trust or commingles personal property with property that should have been held in trust. 4.13 Reprimand is generally appropriate when a lawyer, in an isolated instance, negligently fails to preserve property in trust.

ADB Comment

Note: The Alternative Proposal was published.

Summary of ADB Position: The ADB recommends adoption of its proposed Standard 4.1, with the reinsertion of the language "and causes injury or potential injury," but not the language "to a client" in Standards 4.11 and 4.12. Deletion of "to a client" from ADB proposed Standard 4.13 is also recommended.

Discussion:

I. Overview. The critically important Standard 4.1 applies to conduct ranging from intentional conversion to negligent handling of property by a lawyer. The Board urges adoption of the ADB proposed Standard 4.1 for the following reasons:

- The published standard contains significant drafting problems. Each ADB/ABA standard within Standard 4.1 contains a reference to the lawyer's mental state. The published proposal omits such a reference from Standard 4.12, causing confusion and overlap with Standards 4.11 and 4.13. Additionally, published Standard 4.12 uses language inconsistent with the rest of the standard, does not appear to reach certain careless or grossly negligent conduct covered by the proposed ADB Standard, and drops well-settled and widely used language.

- The ADB/ABA Standards use the phrase "failure to preserve property held in trust" as a heading for Standard 4.1, a general, overarching standard which encompasses specific standards treating knowing conversion as well as lesser forms of improper or negligent dealing with funds.

comment continued . . .

The published proposal uses this broad language not only in Standard 4.1 and its caption, but also in the body of the standards to characterize the conduct calling for the most serious sanction as well as conduct calling for a reprimand. In contrast, the ADB/ABA Standards use terms (such as "knowingly converts" or "deals improperly") to distinguish between certain types of conduct. Such line-drawing is helpful, and the language of the ABA Standards have taken on a settled meaning, both in Michigan and nationally. No good reason to depart from it has been advanced.

- The ADB proposal makes some substantive changes to the ABA Standard, but retains the focus of the standard on client property and retains the basic ABA conceptual framework while making some changes in terminology carefully designed to distinguish certain types of negligent handling of client funds based in part on Michigan disciplinary caselaw.

- The ADB's reference to injury in Standard 4.13 helps place a limitation on the types of money offenses for which reprimands are appropriate. (Also, please see the comment to Standard 3.0 for the ADB's further reflections on the potential usefulness of the injury factor in Standards 4.11 and 4.12.)

- The ABA/ADB Standard is limited to client funds or property. The published standard's coverage (which includes mishandling of property held in trust for third persons) is inconsistent with the caption of 4.0 (violations of duties owed to clients).

II. Title & Coverage of Standard 4.1.

ABA Standard 4.1 applies to failure to preserve a *client's* property. "Lawyers who convert the property of persons other than their clients are covered by Standard 5.11." (Commentary to ABA Standard 4.1.) ABA Standard 5.1 deals with misappropriation, theft, and conduct involving dishonesty, as do the ADB *and* the published Standards 5.1.

Published Standard 4.1 would apply to failure to preserve the property of *non-clients* as well as that of clients. The Board seriously considered this approach and rejected it, and now urges the Court to do the same.

Adoption of published Standard 4.1 would fail to maintain the integrity of the organizational structure of the ABA Standards and cause confusion. Under the published standards, violations of duties to clients are said to be found in Standard 4.0, and violations of duties to the public are found in Standard 5.0. The published standards are internally inconsistent because they contain a standard 4.1 which applies to conduct toward non-clients. The benefit of such a departure from the ABA structure is not articulated or apparent.

Moreover, published Standard 5.1 still contains references to misappropriation, theft, and dishonesty. The ADB/ABA standard would build on these types of misconduct and treat all mishandling of third party property under 5.1. Published Standard 4.1 seeks to address every "failure to preserve property held in trust," presumably including fiduciary breaches outside the attorney client context (for example stealing funds held as club treasurer), and yet the standard says it is restricted to violations of MRPC 1.15. According to at least one resource, "The obligations imposed by Rule 1.15 come into play only when the lawyer's possession of another's property is in connection with the representation of a client." *Annotated Model Rules of Professional Conduct (ABA 2003, 5th ed)*, 249 (citing comment [5] to Model Rule 1.15, which is nearly identical to the fourth paragraph of the comment to Michigan Rule 1.15).

comment continued . . .

In short, while it may initially seem to make sense to treat mishandling of both client and non-client property in one standard, such as 4.1, doing so achieves no substantive policy goal and therefore does not warrant a departure from the ABA format.

III. The ABA's Tested Language and Grades for Money Offenses Should not be Supplanted with new Language Having no Clear or Settled Meaning and Affording Less Guidance in Delineating the Severity of Money Offenses.

The comment in support of the Alternative Proposal's Standard 4.1 states in part:

> I recommend that "fails to preserve" be used in place of the ADB proposed "converts" because it is more consistent with the language of MRPC 1.15.
>
> In 4.12, my recommendation is to replace the nebulous "knowingly deals" with the more limited and much more specific language concerning negligent misappropriation and commingling. The ADB's proposed language appears to create alternative sanctions for the same offense. That is, "knowingly converts" in the Board's 4.11 and "knowingly deals improperly" in the Board 4.12 appear to be distinctions without a difference.

Several important points need to be made in response to this proposal. First, the published standard is not in fact more consistent with MRPC 1.15. Nowhere in MRPC 1.15 is the term "preserve property held in trust" used. Second, the language of the ABA standard seems no more nebulous than the replacement language. Finally, tossing out the ABA language means tossing out Michigan and national precedent which has not been shown to be faulty.

In assessing the appropriate language to use in a standard, the purposes of the standards must be kept in mind. The ABA Standards do something that the Rules of Professional Conduct do not. The rules define misconduct; the standards recommend sanctions for misconduct. The rules may include a certain mental state which must exist for a violation to be proved (most often knowing or unreasonable). However, the rules do not list all of the states of mind which may meet or surpass the thresholds, nor do the rules purport to rank or account for all of the factors mentioned in the standards (see Standards 3.0, 9.22 and 9.32).

The duties and prohibitions in MRPC 1.15 are stated almost as minimum standards of conduct and they include "hold[ing] property . . . separate," depositing client funds in accounts in which no funds belonging to the lawyer are held, and "appropriately safeguard[ing]" property. MRPC 1.15(a). Thus, Rule 1.15 forbids stealing, commingling, and negligent handling of funds in the same breath. The ABA Standards, however, sort out the types of misconduct. Standard 4.1, for example, attempts to rank the egregiousness of lawyer misappropriation. Standard 4.1, as promulgated by the ABA and modified by the Board, attempts to sort in descending order the worst money offenses to the least serious in an effort to give discipline adjudicators meaningful guidance.

Although the Board has used the ABA Standards since their adoption, the more regular use of the ABA Standards since the Court's June 2000 decision in *Lopatin*, *supra*, has produced more consistency in the articulation of presumptive sanctions for knowing conversion/misappropriation. In 1998, the Board stated: "During the 20 years of its existence, the Attorney Discipline Board has regularly declared that willful misappropriation of client funds, absent compelling mitigation, will generally result in discipline ranging from a suspension of three years to disbarment." *Grievance Administrator v David A. Woelkers*, 97-214-GA (ADB 1998). More recently, the Board held:

comment continued . . .

> It is clear from the record below that respondent's conversion of funds violated, at the least, his duties to his client and the legal profession. It is undisputed that respondent acted intentionally by using those funds to pay personal obligations. For the reasons discussed in *Petz*, *supra*, the respondent's failure to safeguard those funds caused not only potential injury to his client but actual injury to public confidence in the legal profession as a repository of client funds. *Petz*, *supra*, pp 8, 9. As in *Petz*, application of the factors in ABA Standard 3.0 leads inevitably to ABA Standard 4.11 and a presumptive discipline of revocation, absent aggravating or mitigating factors. [*Grievance Administrator v Robert G. Vaughan*, 00-125-GA (ADB 2002), citing *Grievance Administrator v Frederick A. Petz*, 99-102-GA; 99-130-FA (ADB 2001), both available on the research page of the Board's website, www.adbmich.org.]

Moreover, several other states refer to ABA Standard 4.1. A Lexis search with the terms "disbar! and (conver! w/10 funds)" turned up 2131 hits. "Disbar! and know! w/5 (conver! w/10 funds)" resulted in 237 hits, the vast majority of which appeared to be pertinent. And, a search with the terms drawn directly from the language of Standard 4.1, "generally appropriate when a lawyer knowingly converts," yielded 170 hits applying that standard in various jurisdictions.

"Conversion," like "misappropriation," is a word which often is meant to suggest intentional acts, but may also cover innocent or technical conduct. Therefore, another jurisdiction's interpretation of the ABA language may prove helpful. See, for example, a Colorado decision holding that: "Knowing conversion requires proof of three elements: (1) the taking of property entrusted to the lawyer, (2) knowledge that the property belongs to another, and (3) knowledge that the taking is not authorized." *Colorado v Jerrold C. Katz*, 58 P 3d 1176 (Colo PDJ 2002) (following *People v Varallo*, 913 P2d 1 (Colo 1996)).

ABA Standard 4.1 is not "broken." The ADB tweaks to that standard preserve its key terms. There is nothing but downside to discarding settled language in favor of changes that are not necessary.

IV. Some Questions Created by the New Language of the Published Standard.

Published Standard 4.11 provides that: "Disbarment is generally appropriate when a lawyer knowingly fails to preserve property held in trust." What will "knowing failure to preserve property in trust" turn out to mean? Is the reach of this language intended to be different than the ABA/ADB language and the caselaw of various jurisdictions applying Standard 4.11? Does not *Grievance Administrator v Robert G. Vaughan*, *supra*, reach the right result for the right reasons? Is there any other reason to wipe out or call into question precedent of the ADB or other jurisdictions regarding money offenses and "knowing conversion" in particular?

Published Standard 4.12 provides that: "Suspension is generally appropriate when a lawyer fails to hold property in trust or commingles personal property with property that should have been held in trust." The following questions are presented by the published standard:

- What is the difference between failing to hold property in trust (4.12) and failing to preserve property (held) in trust (4.11 and 4.13)?

- Since there is no limitation on the mental state for 4.12, it seems to overlap – perhaps even swallow – 4.11 and 4.13 by recommending suspension for any failure to hold property in trust irrespective of mental state.

comment continued . . .

Published Standard 4.13 provides that: “Reprimand is generally appropriate when a lawyer, in an isolated instance, negligently fails to preserve property held in trust.” Published Standard 4.12 expressly refers to commingling. Published Standard 4.13 does not. Does this mean that reprimand would generally not be appropriate for negligent commingling? If so, what is the basis for the distinction between that form of failure to hold property in trust and others, and why would suspension be appropriate for an isolated instance of commingling whereas other, perhaps worse, negligent handling of funds would presumptively receive a reprimand?

V. Conclusion.

These are just a few of the readily apparent problems we have been able to note. Of course, it is more difficult to spot problems in the abstract than it will be in concrete cases when new language is applied. This is why the Board again urges no departure from time tested language without good reasons being advanced. In conclusion, the Board urges in the strongest possible terms that Standard 4.1 as originally proposed by the Board be adopted.

D. Recommended Sanctions — 4.0 Violations of Duties Owed to Clients
4.2 FAILURE TO PRESERVE THE CLIENT'S CONFIDENCES

Supreme Court (Published for Comment July 29, 2003)	**Attorney Discipline Board** (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** (Submitted September 2002)
The following sanctions are generally appropriate in cases involving improper revelation of information in violation of MRPC 1.6 and 1.9(c): 4.21 Disbarment is generally appropriate when a lawyer, in a scheme to benefit the lawyer or another, knowingly reveals information protected under MRPC 1.6 or 1.9(c). 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information protected under MRPC 1.6 or 1.9(c), where the revelation is not part of a scheme to benefit the lawyer or another. 4.23 Reprimand is generally appropriate when a lawyer fails to use reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using the confidences or secrets of a client.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client: 4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client. 4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.	The following sanctions are generally appropriate in cases involving improper revelation of information in violation of MRPC 1.6 and 1.9(c): 4.21 Disbarment is generally appropriate when a lawyer, in a scheme to benefit the lawyer or another, knowingly reveals information protected under MRPC 1.6 and 1.9(c). 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information protected under MRPC 1.6 and 1.9(c), where the revelation is not part of a scheme to benefit the lawyer or another. 4.23 Reprimand is generally appropriate when a lawyer fails to use reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client.

ADB Comment

Note: The published version differs from the Alternative Proposal in Standards 4.21 and 4.22 in that it reads "under MRPC 1.6 or 1.9(c)," instead of "and."

Summary of ADB Position: The Board recommends adoption of the proposed ADB/ABA standard, perhaps with a modification to Standard 4.23 inspired by the standard published for comment.

Discussion:

The standard published for comment is based on the current Michigan RPC 1.6. The Court has published for comment the State Bar of Michigan's recommendation to follow the terminology of the ABA Model Rule ("A lawyer shall not reveal information relating to the representation of a client . . ."). If that change is adopted by the Court, the language as originally proposed by the ADB will be consistent with the rule.

The Board also has substantive concerns about the published standard. Standards 4.21 and 4.22 reference a "scheme," the presence or absence of which becomes pivotal in distinguishing between cases warranting disbarment and those deserving suspension. No information regarding this source of this factor has been presented. This new language may distinguish *some* of the worst Rule 1.6 violations, but the requirement of a "scheme" may also be interpreted in ways that allow knowing revelation of confidential information to receive a lesser sanction than recommended under ADB/ABA Standard 4.2.

comment continued . . .

Published Standard 4.23 is also problematic. This standard excludes any circumstance under which a reprimand may generally be appropriate when a lawyer reveals information protected under MRPC 1.6 or 1.9(c). Thus, suspension is "generally appropriate" if the lawyer "knowingly" reveals information even if the information is irrelevant or immaterial and the lawyer has a good faith belief that the information is not protected.

Further, the comments supporting the Alternative Proposal claim that:

> The ADB's proposed Standard 4.23 criminalizes conduct that does not violate the MRPC. Specifically, MRPC 1.6(b) prohibits a lawyer from "knowingly" revealing a confidence or secret. Yet, the ADB proposed Standard defines "negligent" disclosure as sanctionable. There is simply no basis under MRPC 1.6 to suggest that negligent revelation of information can be sanctioned.

Actually, a lawyer does have a duty under the rules of professional conduct to take reasonable steps to avoid negligent disclosure of "confidential" information. See ABA Model Rules of Professional Conduct (2004 Edition), comment [15] to Rule 1.6:

> A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

The fact that this duty may be imposed by rules other than MRPC 1.6 could call into question the advisability of reciting what purports to be an exclusive list of applicable rules in the preamble of each standard.

Under published Standard 4.23, reprimand is reserved for the situation in which the lawyer fails to use reasonable care to prevent others from disclosing confidences. Published Standard 4.23 follows the language of Michigan's current MRPC 1.6(d), a holdover from the Code. That language has been dropped in the amendments to MRPC 1.6 proposed by the State Bar and published by the Court. See July 2, 2004 Order Regarding Proposed Adoption of New MRPC (ADM 2003-62). This deletion would not eliminate the attorney's duty to supervise employees and contractors and take reasonable steps to assure that their conduct conforms with the attorney's professional responsibilities. See MRPC 5.3.

Published Standard 4.23 is helpful in that it references a lawyer's duty to adequately supervise staff and contractors so as to protect information relating to the representation of a client (or confidences). Perhaps this aspect could be added to the ADB/ABA proposal.

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

Supreme Court (Published for Comment July 29, 2003)	**Attorney Discipline Board** (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** (Submitted September 2002)
The following sanctions are generally appropriate in cases involving conflicts of interest in violation of MRPC 1.7, 1.8, 1.9(a) or (b), 1.10, 1.11, 1.12, 1.13, 5.4(c), or 6.3.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving conflicts of interest:	The following sanctions are generally appropriate in cases involving conflicts of interest in violation of MRPC 1.7; 1.8; 1.9(a) and (b); 1.10; 1.11: 1.12; 1.13; 5.4(c); and, 6.3.
4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of the client(s):	4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):	4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of the client(s):
(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's in order to obtain a benefit or advantage for the lawyer or another; or	(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or	(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's to obtain a benefit or advantage for the lawyer or another; or
(b) simultaneously represents clients that the lawyer knows have adverse interests in order to obtain a benefit or advantage for the lawyer or another; or	(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or	(b) simultaneously represents clients that the lawyer knows have adverse interests to obtain a benefit or advantage for the lawyer or another; or,
(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client in order to obtain a benefit or advantage for the lawyer or another; or	(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.	(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client to obtain a benefit or advantage for the lawyer or another; or,
(d) engages in a transaction described in MRPC 1.8(a) with a client wherein the lawyer deceives the client into believing that the transaction and the terms on which the lawyer acquires the interest are fair and reasonable to the client, when the lawyer knows that the transaction and terms are unfair and unreasonable.		(d) engages in a transaction described in MRPC 1.8(a) with a client where in the lawyer deceives the client into believing the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client, when the lawyer knows the transaction and terms are unfair and unreasonable.
Continued on next page.	Continued on next page.	Continued on next page.

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST (CONTINUED)

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
4.32 Suspension is generally appropriate when: (a) a lawyer knows of a conflict of interest and does not seek to obtain consent from the present or former client after consultation; or (b) a lawyer knowingly violates MRPC 1.8(c)-(j). 4.33 Reprimand is generally appropriate when a lawyer engages in a conflict of interest in violation of MRPC 1.7, 1.8, or 1.9(a) and (b), but does not knowingly violate the rule(s).	4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.	4.32 Suspension is generally appropriate when: (a) a lawyer knows of a conflict of interest and does not seek to obtain consent from the present or former client after consultation; or (b) a lawyer knowingly violates MRPC 1.8(c)-(j). 4.33 Reprimand is generally appropriate when a lawyer engages in a conflict of interest in violation of MRPC 1.7, 1.8 and/or 1.9(a) and (b), but did not knowingly violate the rule(s).

ADB Comment

Note: The Alternative Proposal was published with minor changes.

Summary of ADB Position: The standard proposed by the ADB should be adopted.

Discussion:

The comment to the Alternative Proposal's recommended Standard 4.3 reads in its entirety:

> While the ADB's proposed Standard suggests that violations of MRPC 1.8 should be addressed in Standard 4.3 (see ADB's Appendix 1), there is no language applicable to a violation of MRPC 1.8(a) - (j) in the ADB's proposed Standard 4.3. My recommended language in Standards 4.31(d), 4.32(b) and 4.33 address [sic] those rules.
>
> The changes to 4.33 are suggested because the language of MRPC 1.7, 1.8 and 1.9 create [sic] strict liability offenses. The ADB's proposed Standard is awkwardly worded and does not adequately address the strict liability aspect of the rules. I believe that, on the whole, the recommended Standard is much more consistent with the MRPC than the ADB's proposed language.

It is true that the specific language of MRPC 1.8 is not addressed in the ADB/ABA Standard 4.3. One reason for this may be that "many of the specific conflicts of interest addressed by Rule 1.8 also fit within the more general rubric of Rule 1.7." 1 Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering* (3rd ed), §11.2, p 11-4.1. Indeed, many of the specific conflict rules overlap with the basic rule, MRPC 1.7.

comment continued . . .

It should be noted that the language of Rules 1.10, 1.11, 1.12, 1.13, 5.4(c), or 6.3 is also not contained in the ADB's proposed standard or in the ABA's version. Significantly, the language of these rules is not contained in published Standard 4.3 either, nor is the language of MRPC 1.8(b). It is not apparent why certain violations of MRPC 1.8 were deemed more deserving of specific treatment in the published standard than violations of these other rules.

Perhaps it would be appropriate to explore refining the language of Standard 4.3 with an eye toward addressing the various types of specific conflict rules covered by this standard. However, as has been noted elsewhere, the Board charted an incrementalist course of expansion and revision of the Standards. New standards should be drafted after study of available pertinent decisions and deliberation as to whether such precedent appropriately identified the factors calling for different sanctions for a type of misconduct. The Alternative Proposal, and the resulting changes to Standard 4.3 published for comment, introduce significant departures from the ABA Standards and may warrant such further deliberation.

Published Standard 4.3

- replaces "with the intent to benefit" with "in order to obtain a benefit or advantage for" in subsections (a) - (c) of Standard 4.31;
- adds a new subsection (d) to Standard 4.31 dealing with MRPC 1.8(a) violations;
- deletes the references to injury and potential injury throughout;
- rewords ADB/ABA Standard 4.32 to focus on client consent instead of lawyer disclosure, as well as mentioning former clients and placing the standard in a new subsection (a);
- adds a new subsection (b) of Standard 4.32 recommending suspension when "a lawyer knowingly violates MRPC 1.8(c)-(j)"; and,
- rewords the reprimand standard, Standard 4.33, significantly.

Published Standard 4.3 raises several questions, including the following:

- *Changes in the terminology of 4.31(a)-(c) – "benefit or advantage . . ."* Because this is a departure from the ABA Standards, it will be argued that something new or different is intended. What would that be?

- *Standard 4.31(d) & MRPC 1.8(a)* – Is the scenario described in the Alternative Proposal/published standard the only circumstance in which disbarment would be appropriate for a violation of MRPC 1.8(a) (regarding business transactions with clients)? Is it the best way to formulate the recommended sanction for disbarment? Is this new standard necessary or wouldn't the ADB version of Standard 4.31(a) yield the same recommended result?

- *Standards 4.32 & 4.33 & MRPC 1.8(a)* – When, if ever, is suspension appropriate for a violation or MRPC 1.8(a)? Published Standard 4.32 (suspensions) does not reference MRPC 1.8(a), nor does Standard 4.33. The specific reference to MRPC 1.8(a) in Published Standard 4.31(d) raises the question whether Standards 4.32 and 4.33 are intended to cover 1.8(a) violations. Assuming they do, what if a lawyer violates MRPC 1.8(a) by not getting consent in writing, or by engaging in an unfair transaction without deceit? A lawyer who knowingly engages in an unfair transaction may deserve a suspension more readily than a lawyer who

comment continued . . .

knowingly fails to obtain consent in writing. It might be argued that a reprimand would be appropriate for a lawyer who enters into a business deal with his client after complying with all of the other provisions of MRPC 1.8(a), including fairness and full disclosure in writing, but fails to reduce the client's *consent* to writing.

- *Standard 4.32(a)* – The published standard calls for suspension when a lawyer knows of a conflict and "does not seek to obtain consent from the present or former client after consultation." The ADB/ABA standard recommends suspension when the lawyer knows of a conflict and "does not fully disclose to a client the possible effect of that conflict" (and causes injury or potential injury to a client). Should the focus be shifted from disclosure to failure to obtain consent? The recently amended Model Rule 1.7(b) requires affected clients to give "informed consent" when a concurrent conflict exists. But, this new terminology does not represent a new concept. Canon 6 of the 1908 Canons of Professional Ethics declared it "unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts." Although the published standard does reference "consultation," the emphasis seems to remain on seeking consent, and the ADB/ABA standard focuses on failure to disclose the possible effect of a conflict, arguably a more pertinent factor. Also, it may not make sense to embrace the language of the existing Rule 1.7 given the pendency of the proposed "Ethics 2000" amendments to the Rules of Professional Conduct which have been published by the Court.

- *Standards 4.32(b) & 4.33 – knowing vs unknowing violations* – Should the determinative distinction between suspension and reprimand be whether the violation of the rule was done knowingly or not? Note that other standards seem to key the sanction recommendation to a relevant mental state regarding some critical fact (e.g., that the lawyer's interests are adverse to the clients – 4.31(a)) rather than to whether "violation of the rule(s)" was done knowingly (see published Standard 4.33).

- *Standard 4.33 – Scope; Meaning; "Strict Liability"* - Will this standard be read to say that a reprimand is not appropriate for violations of the Rules of Professional Conduct not listed in the standard? Also, the Alternative Proposal's comment states that the changes to Standard 4.33 were "suggested because the language of MRPC 1.7, 1.8, and 1.9 create strict liability offenses." If "strict liability" means, as it usually does, liability without reference to an actor's mental state, then it is difficult to understand what this comment means in light of Rule 1.7's express references to the reasonableness of a lawyer's belief. It is also difficult to understand how the Alternative Proposal/published standard more "adequately address[es] the strict liability aspect of the rules" by making the recommended sanction turn on whether the lawyer "knowingly violate[d] the rules." (Please also see the foregoing comment regarding the ambiguity of the "knowing violation" factor.)

- Attempting to craft standards for conflicts of interest found to be impermissible raises, once again, the question whether the factor of injury or potential injury be considered in Section D of the standards. Conflict rules are acknowledged to be prophylactic in nature. They involve an assessment of the risk that competing interests will in fact harm a client. Some questions in this area can be quite close. Finally, litigation provides an incentive for parties to raise conflict questions in disqualification motions in civil proceedings.

Alternative A to Proposed Standards 4.4 and 4.5

4.4 LACK OF DILIGENCE

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client: 4.41 Disbarment is generally appropriate when: (a) a lawyer abandons the practice of law ~~and causes serious or potentially serious injury to a client~~; or (b) a lawyer knowingly fails to perform services for a client ~~and causes serious or potentially serious injury to a client~~; or (c) a lawyer engages in a pattern of neglect with respect to client matters ~~and causes serious or potentially serious injury to a client~~. 4.42 Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client ~~and causes injury or potential injury to a client~~; or (b) a lawyer engages in a pattern of neglect ~~and causes injury or potential injury to a client~~. 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client~~, and causes injury or potential injury to a client~~.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client: 4.41 Disbarment is generally appropriate when: (a) a lawyer abandons the practice of law and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. 4.42 Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.	The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.1(a)-(c); 1.2(a) and (b); 1.3; and, 1.4: 4.41 Disbarment is generally appropriate when: (a) a lawyer abandons the practice of law; or (b) a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures. 4.42 Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client in a reasonably diligent and prompt manner; (b) a lawyer engages in a pattern of neglect; or, (c) a lawyer handles a matter that the lawyer knows or should know that the lawyer is not competent to handle. 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client or handles a matter without preparation adequate in the circumstances.

ADB Comment

Note: "Note that Alternative A, above, is the ADB's original proposal concerning lawyer incompetence, with changes agreed upon by the Court indicated by strikeovers (that language will be deleted if the Court decides to enter an amended order)." Supreme Court Note, July 29, 2003 order in File No. 2002-29.

Summary of ADB Position: The ADB recommends adoption of ADB proposed Standard 4.4, i.e., Alternative A, but with the retention of the references to injury and potential injury.

comment continued . . .

Discussion:

Published alternative A is the ADB proposal without reference to injury. Alternative B collapses the duties of diligence and competence, and recommended sanctions for such misconduct, into one standard. For several reasons, the ADB strongly urges the Court to adopt the Board's proposed Standard 4.4.

Diligence and Competence Should have Separate Standards.

Although the duties of competence and diligence can overlap, and violations of MRPC 1.1 and 1.3 often occur together or in similar settings, the duties are in fact distinct. See Geoffrey C. Hazard, Jr., & W. William Hodes, 1 *The Law of Lawyering* (3rd ed), §3.2, p 3-3 (tracing the history of the development of "a duty of competence separate from the related duty of diligence"). Although there has been some debate nationally about whether competence "is an enforceable duty of professional ethics, rather than [a] . . . duty enforceable through tort litigation," *id.*, the ADB believes that competence is a key duty, a problem to be addressed by the profession, and deserving of its own rule, standard, and developing caselaw delineating the contours of the duty.

Standard 4.41(a).

The ABA Standards and the standards proposed by the ADB suggest that disbarment is generally appropriate when a lawyer abandons the practice of law, and causes "serious or potentially serious injury to a client." By contrast, both alternatives to published Standard 4.41(a) eliminate consideration of the degree of harm at this stage and recommend disbarment as generally appropriate when a lawyer abandons the practice of law, regardless of the degree of harm to the client or, apparently, without any injury to clients at all. Thus, a hearing panel seeking guidance from the Standards to arrive at appropriate sanctions for a lawyer who has abandoned an active caseload of hundreds of files with no thought for the protection of the clients' interests and the lawyer who "abandons the practice of law" with no active clients but with one or two unanswered letters will seemingly be directed to consider disbarment in both cases. (Note that under published Standard 9.32 [mitigation], the panel could differentiate between the two situations on the basis of harm to a client *only* if it found that the second lawyer's conduct was accompanied by "absence of any degree of harm.")

Standards 4.41(b) and (c) and 4.42(a) and (b).

Under the ABA Standards and the standards proposed by the ADB, suspension is generally appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes "injury or potential injury" to a client but the same conduct should generally warrant disbarment if accompanied by "serious or potentially serious injury" to a client. By eliminating any reference to injury in these standards, published standard 4.41(b) proposes (in Alternative A) that disbarment is generally appropriate when "a lawyer knowingly fails to perform services for a client." Identical language appears in Alternative A's Standard 4.42(a) which *also* recommends that suspension is generally appropriate when "a lawyer knowingly fails to perform services for a client."

In short, Alternative A to proposed Standard 4.4 provides no guidance whatsoever to the panelist or practitioner attempting to discern a difference between conduct warranting disbarment and conduct warranting suspension since both sanctions are deemed to be appropriate when "a lawyer knowingly fails to perform services for a client."

comment continued . . .

Standards 4.41(c) and 4.42(b).

The same problem exists with respect to 4.41(c) and 4.42(b) in Alternative A to published Standard 4.4. By eliminating the references to injury, the published standards have eliminated any means of distinguishing between conduct warranting disbarment and conduct warranting suspension for a lawyer who “engages in a pattern of neglect with respect to client matters.”

Alternative A to Proposed Standards 4.4 and 4.5

4.5 LACK OF COMPETENCE

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The following sanctions are generally appropriate in cases involving failure to provide competent representation to a client: 4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures~~, and the lawyer's conduct causes injury or potential injury to a client~~. 4.52 Suspension is generally appropriate when a lawyer knowingly fails to provide competent representation~~, and causes injury or potential injury to a client~~. 4.53 Reprimand is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures ~~and causes injury or potential injury to a client~~; or II. negligently fails to provide competent representation ~~and causes injury or potential injury to a client~~.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving failure to provide competent representation to a client: 4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client. 4.52 Suspension is generally appropriate when a lawyer ~~engages in an area of practice in which the lawyer knows he or she is not competent~~ knowingly fails to provide competent representation, and causes injury or potential injury to a client. 4.53 Reprimand is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (b) ~~is~~ negligently ~~in determining whether he or she is competent to handle a legal matter~~ fails to provide competent representation and causes injury or potential injury to a client.	[No Proposed Alternative]

ADB Comment

Note: "Note that Alternative A, above, is the ADB's original proposal concerning lawyer incompetence, with changes agreed upon by the Court indicated by strikeovers (that language will be deleted if the Court decides to enter an amended order)." Supreme Court Note, July 29, 2003 order in File No. 2002-29.

Summary of ADB Position: The ADB supports a modified version of ADB proposed Standard 4.5, i.e., Alternative A, but with the retention of the references to injury and potential injury, and with the following language in place of the ADB's original Proposed Standard 4.51:

> Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer cannot or will not master the knowledge and skills necessary for minimally competent practice, and the lawyer's conduct causes injury or potential injury to a client.

comment continued . . .

Discussion:

Our letter dated January 26, 2005, discusses competence at some length and those comments are incorporated by reference. The Board's comments to the previous standard (4.4 - Alternative A) are also pertinent as to the preference for a distinct competence standard consistent with the numbering in the ABA Standards. However, upon further review of ABA Standard 4.5, the Board suggests that Standard 4.51 could be improved as follows:

> Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer cannot or will not master the knowledge and skills necessary for minimally competent practice, and the lawyer's conduct causes injury or potential injury to a client.

This language was drawn from the commentary to ABA Standard 4.51 and is intended to better express the difference between an incorrigible incompetent and the practitioner who might be redeemed. It could be argued that ABA Standard 4.51 and 4.53(a) appear too similar in light of the difference in recommended sanctions.

Alternative B to Proposed Standards 4.4 and 4.5

4.4 LACK OF DILIGENCE

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.1(a)-(c), 1.2(a) or (b), 1.3, or 1.4: 4.41 Disbarment is generally appropriate when: (a) a lawyer abandons the practice of law; or (b) a lawyer knowingly fails to perform services for a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters. 4.42 Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client in a reasonably diligent and prompt manner; or (b) a lawyer engages in a pattern of neglect; or (c) a lawyer handles a matter that the lawyer knows or should know that the lawyer is not competent to handle. 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client or handles a matter without preparation adequate under the circumstances.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client: 4.41 Disbarment is generally appropriate when: (a) a lawyer abandons the practice of law and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. 4.42 Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. **[SAME AS IN ALTERNATIVE A ABOVE]**	The following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client in violation of MRPC 1.1(a)-(c); 1.2(a) and (b); 1.3; and, 1.4: 4.41 Disbarment is generally appropriate when: (a) a lawyer abandons the practice of law; or (b) a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures. 4.42 Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client in a reasonably diligent and prompt manner; (b) a lawyer engages in a pattern of neglect; or, (c) a lawyer handles a matter that the lawyer knows or should know that the lawyer is not competent to handle. 4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client or handles a matter without preparation adequate in the circumstances. **[SAME AS IN ALTERNATIVE A ABOVE]**

ADB Comment

Note: Alternative B is the Alternative Proposal. It treats violations of all of the rules enumerated in one standard (4.4, captioned "Lack of Diligence") instead of treating competence under Standard 4.5 (see ADB/ABA Standard 4.5).

Summary of ADB Position: The Board recommends adoption of ADB proposed Standards 4.4 and 4.5, as set forth in the foregoing comments.

Discussion:

Please see the Board's comments to published Standard 4.4 and 4.5, Alternative A, above.

Alternative B to Proposed Standards 4.4 and 4.5
4.5 CHARGING ILLEGAL OR CLEARLY EXCESSIVE FEES

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The following sanctions are generally appropriate in cases involving the charging of an illegal or clearly excessive fee in violation of MRPC 1.5: 4.51 Disbarment is not generally appropriate when a lawyer charges or collects a clearly excessive fee absent the presence of significant factors in aggravation. 4.52 Suspension is generally appropriate when a lawyer knowingly charges or collects a clearly excessive fee. 4.53 Reprimand is generally appropriate when a lawyer negligently charges or collects a clearly excessive fee.	[No Proposed Alternative]	The following sanctions are generally appropriate in cases involving the charging of an illegal or clearly excessive fee in violation of MRPC 1.5: 4.51 Disbarment is not generally appropriate when a lawyer charges or collects a clearly excessive fee absent the presence of significant factors in aggravation. 4.52 Suspension is generally appropriate when a lawyer knowingly charges or collects a clearly excessive fee. 4.53 Reprimand is generally appropriate when a lawyer negligently charges or collects a clearly excessive fee.

ADB Comment

Note: Alternative B is the Alternative Proposal Standard 4.5 which replaces competence (treated in ADB/ABA Standard 4.5 and treated by the Alternative Proposal in Standard 4.4).

Summary of ADB Position: The Board urges adoption of its proposed Standard 4.5 on competence, as modified in the foregoing comments. The Board recommends that the drafting of a standard on excessive fees be drafted after study of pertinent decisions and careful articulation of relevant factors.

Discussion:

For reasons of both form and substance, the ADB recommends that adoption of a separate standard regarding excessive fees be deferred pending further consideration of appropriate factors to be utilized in recommending sanctions, as well as the most appropriate section of the standards in which to insert such a new provision. No caselaw or other authorities have been offered in support of the levels of discipline set forth in the published standard. Generally speaking, most excessive fee charges are accompanied by other violations such as serious neglect, failure to return unearned fees, and misappropriation. Rather than rush to adopt a standard 4.51 broadly stating that disbarment is not generally appropriate for excessive fee violations, the Board would prefer to study the factors which might lead to an affirmative statement as to when disbarment would be appropriate. This would be more helpful and more consistent with the other standards. Similarly, it may be wise to explore alternative formulations for the recommended sanctions in 4.52 and 4.53. For example, it is not immediately clear just how "a lawyer negligently charges or collects a clearly excessive fee."

Also, as is discussed in various contexts throughout these comments, the numbering of standards should not, absent good reason, be different than those employed in other states. Thus, if a standard dealing entirely or in part with excessive fees is adopted in the future, such a standard should not be numbered 4.5, as that is where those who are familiar with the ABA Standards would assume the competence standard would be.

4.6 LACK OF CANDOR

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client in violation of MCR 9.104(A)(2) or (3) or MRPC 8.4(b). 4.61 Disbarment is generally appropriate when a lawyer deceives a client to obtain a benefit or advantage for the lawyer or another. 4.62 Suspension is generally appropriate when a lawyer deceives a client, and the deception reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law, but is not done to obtain a benefit or advantage for the lawyer or another. **ALTERNATIVE A TO PROPOSED STANDARD 4.63** 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information. **ALTERNATIVE B TO PROPOSED STANDARD 4.63** 4.63 Reprimand is generally not appropriate when a lawyer engages in fraud, deceit or misrepresentation toward a client.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client: 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client. 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.	The following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client in violation of MCR 9.104(A)(2) and (3) and MRPC 8.4(b). 4.61 Disbarment is generally appropriate when a lawyer deceives a client to obtain a benefit or advantage for the lawyer or another. 4.62 Suspension is generally appropriate when a lawyer deceives a client, and the deception reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law, but is not done to obtain a benefit or advantage for the lawyer or another. 4.63 Reprimand is generally not appropriate when a lawyer engages in fraud, deceit or misrepresentation toward a client.

ADB Comment

Note: The Alternative Proposal was published. Alternative A is the ADB/ABA Standard 4.63 without reference to injury.

Summary of ADB Position: The ADB recommends adoption of its Proposed Standard 4.6, with the following modification to Standard 4.63: "Reprimand is generally appropriate when a lawyer makes a misrepresentation to a client that adversely reflects on the lawyer's fitness to practice law to a slight degree."

Discussion:

While the published standard represents an attempt to improve ABA Standard 4.6, the Board again recommends following the ABA for the most part. In particular, the Board, believing that arguable redundancy is far better than ambiguity, recommends that the word "knowingly" should be retained

comment continued . . .

before the word "deceives." The Board also suggests that this standard demonstrates the importance of the injury factor. Finally, the Board offers yet a third alternative Standard 4.63.

A. Deletion of "Knowingly" Before "Deceives"

ABA Standards 4.61 and 4.62 use the term "knowingly deceives." The ADB recommended this language. The Alternative Proposal and the published version deleted "knowingly." The comment supporting Standard 4.6 in the Alternative Proposal states: "It is axiomatic that deceit requires 'knowledge' on the part of the deceiver." Given *some* of today's common dictionary definitions of "deceive," the insertion of "knowingly" *might* appear redundant. However, not all definitions are so clear. See, e.g., *Beavers v Williams*, 199 Ga 113; 33 SE2d 343 (1945) (quoting the following still frequently used definition: "To lead into error; to cause to believe what is false or disbelieve what is true; to impose upon."). A widely used dictionary touted as the official dictionary of the Associated Press defines "deceive" as follows: "1. to make (a person) believe what is not true; delude; mislead." Webster's New World College Dictionary (4th ed, 2001), p 374. That dictionary's synonymy states: "deceive implies deliberate misrepresentation of facts by words, actions, etc., generally to further one's ends." However, the synonym next listed is "mislead," and the definition of "mislead" is as follows: "to mislead is to cause to follow the wrong course or to err in conduct or action, although not always by deliberate deception." Webster's New World College Dictionary (4th ed, 2001), p 374. Thus, the main entry lists "mislead" as a synonym, and one may mislead without deliberate action.

See also MCL 752.1002(2)(b) (Michigan's Health Care False Claim Act), which contains the following definition:

> "Deceptive" means making a claim to a health care corporation or health care insurer which contains a statement of fact or which fails to reveal a material fact, which statement or failure leads the health care corporation or health care insurer to believe the represented or suggested state of affair to be other than it actually is.

The foregoing statutory definition does not require knowledge on the part of the person making the statement. Drafters of other codes have thought it worthwhile to clarify the mental state at issue when defining deception. See, e.g., *Ohio Revised Code § 2913.01* ("'Deception' means knowingly deceiving another . . . .").

Thus, the Board believes that leaving "knowingly" in the text (1) makes it clear that innocent or unintentional deception, if such could occur, is not the conduct at issue in Standards 4.61 and 4.62; (2) clarifies the state of mind required in a manner consistent with other standards (if the ADB/ABA definition of "knowledge" is restored as urged above); and, (3) makes it consistent with ABA model, so that readers will not have to ponder over the reason for deletion.

B. Standard 4.62

Published Standard 4.62 belies the argument that "deception" need not be qualified in any way. Published Standard 4.62 recommends suspension only when "the deception reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law . . . ." (Also, the omission of this language from Standards 4.61 and 4.63 might raise questions of interpretation.) The ADB/ABA approach essentially equates knowing deception with an adverse reflection on the lawyer's honesty, etc., and is thus more economical and more precise.

comment continued . . .

C. Standard 4.63

The comment supporting the Alternative Proposal argues that only knowing misrepresentations are prohibited by the Rules of Professional Conduct, and, therefore, the ADB/ABA proposal inappropriately "criminalizes" conduct. While not true, this argument does raise the good point that negligent misrepresentation may be out of place in a standard involving lack of candor. The ABA doubtless viewed a lawyer's negligent failure to provide a client with accurate or complete information as being on the low end of a continuum involving defective communication with the client.

While we do not agree with the Alternative Proposal's assumption that negligent failure to provide a client with accurate or complete information should always escape sanction, perhaps this potential MRPC 1.4 violation should be treated under 4.4 (diligence) inasmuch as Standard 4.6 seems directed toward knowing deceit and misrepresentation as the Alternative Proposal points out.

Finally, Alternative B simply states that reprimand is generally not appropriate when a lawyer engages in fraud, etc., toward a client. This is likely true, but not necessarily helpful. Perhaps an affirmative statement (like most of the other reprimand standards) as to when reprimand *is* appropriate could be crafted, and Standard 4.63 could read:

> Reprimand is generally appropriate when a lawyer makes a misrepresentation to a client that adversely reflects on the lawyer's fitness to practice law to a slight degree.

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

Supreme Court
(Published for Comment July 29, 2003)

The following sanctions are generally appropriate in cases involving conduct in violation of MCR 9.104(A)(5) or MRPC 3.5(c), 4.1, 6.5, or 8.4(b).

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes: intentional interference with the administration of justice, false swearing, intentional misrepresentation, fraud, extortion, misappropriation, or theft; the sale, distribution or importation of controlled substances; the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other conduct involving dishonesty, fraud, deceit, or misrepresentation that is a seriously adverse reflection on the lawyer s fitness to practice; or

(c) a lawyer knowingly mistreats a person involved in the legal process because of the person's race, gender, or other protected personal characteristic in order to gain an advantage in the litigation for the lawyer or another; or

(d) a lawyer knowingly engages in conduct that is discourteous and disrespectful toward a tribunal in order to gain an advantage in the litigation for the lawyer or another.

5.12 Suspension is generally appropriate when:

(a) a lawyer engages in criminal conduct that does not contain the elements listed in Standard 5.11 but that nevertheless adversely reflects on the lawyer's fitness to practice; or

(b) a lawyer engages in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice; or

Attorney Discipline Board
(Submitted June 2002)
(deletions from the ABA Standards ~~struck through~~ and additions double underlined)

~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate: (a) in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects~~, or~~ ; (b) in cases with conduct involving dishonesty fraud, deceit, or misrepresentation; or (c) in cases involving the improper handling of property entrusted to a lawyer.

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, intentional misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice~~.~~ or

(c) a lawyer knowingly converts the property of another entrusted to the lawyer.

5.12 Suspension is generally appropriate when:

(a) a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 ~~and that~~ but which nevertheless seriously adversely reflects on the lawyer's fitness to practice; or

(b) a lawyer engages in conduct involving dishonesty, fraud, deceit, or knowing misrepresentation that reflects adversely on the lawyer's fitness to practice; or

Alternative Proposal
(Submitted September 2002)

The following sanctions are generally appropriate in cases involving conduct in violation of MCR 9.104(A)(5) and MRPC 3.5(c); 4.1; 6.5; and, 8.4(b).

5.11 Disbarment is generally appropriate when

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, intentional misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice; or,

(c) a lawyer knowingly mistreats a person involved in the legal process because of the person's race, gender, or other protected personal characteristic in order to gain an advantage in the litigation for the lawyer or another; or

(d) a lawyer knowingly engages in conduct that is discourteous and disrespectful toward a tribunal in order to gain an advantage in the litigation for the lawyer or another.

5.12 Suspension is generally appropriate when:

(a) a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11 but which nevertheless adversely reflects on the lawyer's fitness to practice; or

(b) a lawyer engages in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice; or,

(c) a lawyer knowingly mistreats a person involved in the legal process because of the person's race, gender, or other protected personal characteristic without the purpose of gaining an advantage in the litigation for the lawyer or another; or (d) a lawyer knowingly engages in conduct that is discourteous and disrespectful toward a tribunal without the purpose of gaining an advantage in the litigation for the lawyer or another. **ALTERNATIVE A TO PROPOSED STANDARD 5.13** 5.13 Reprimand is generally appropriate when a lawyer engages in criminal conduct that does not contain the elements listed in Standard 5.11. **ALTERNATIVE B TO PROPOSED STANDARD 5.13** 5.13 Reprimand is generally appropriate when: (a) a lawyer engages in criminal conduct that does not contain the elements listed in Standard 5.11 and that reflects adversely on the lawyer's fitness to practice; or (b) a lawyer engages in any conduct that involves dishonesty, fraud, deceit, or knowing misrepresentation and that adversely reflects on the lawyer's fitness to practice law to a slight degree; or (c) a lawyer engages in an isolated instance of simple negligence in dealing with the property of another entrusted to the lawyer and causes little or no injury or potential injury.	(c) a lawyer knowingly or negligently deals improperly with the property of another entrusted to the lawyer. 5.13 Reprimand is generally appropriate when: (a) a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that reflects adversely on the lawyer's fitness to practice; or (b) a lawyer ~~knowingly~~ engages in any ~~other~~ conduct that involves dishonesty, fraud, deceit, or knowing misrepresentation and that adversely reflects on the lawyer's fitness to practice law to a slight degree; or (c) a lawyer engages in an isolated instance of simple negligence in dealing with the property of another entrusted to the lawyer and causes little or no injury or potential injury.	(d) a lawyer knowingly mistreats a person involved in the legal process because of the person's race, gender, or other protected personal characteristic without the purpose of gaining an advantage in the litigation for the lawyer or another; or, (e) a lawyer knowingly engages in conduct that is discourteous and disrespectful toward a tribunal without the purpose of gaining an advantage in the litigation for the lawyer or another. 5.13 Reprimand is generally appropriate when a lawyer engages in criminal conduct which does not contain the elements listed in Standard 5.11.

ADB Comment

Note: The Alternative Proposal as to Standards 5.11 and 5.12 was published. It is the ADB proposal with the addition of standards applicable to MRPC 3.5(c) and 6.5 violations, deletion of standards dealing with a lawyer's improper handling of third party (i.e., non-client) property, deletion of "intentional" in Standard 5.11(b), and the deletion of "knowing" in Standard 5.12(b). Published Standard 5.13, Alternative A, is the Alternative Proposal recommendation. Published Alternative B is the ADB proposal.

Summary of ADB Position: The Board strongly urges adoption of ADB proposed Standard 5.1, with one modification to Standard 5.13(b). The Board perceives several serious problems with the standard published for comment, which are set forth below.

comment continued . . .

Discussion:

I. Introduction & Overview

Several important types of misconduct are treated in Standard 5.1 The ADB/ABA proposed standard deals with

- criminal conduct,
- dishonest conduct, and
- a specific type of conduct which could fall into both of those categories – defalcation or other mishandling of funds or property belonging to persons other than the lawyer's clients.

The published version adds two additional types of misconduct:

- conduct that is "discourteous and disrespectful" toward a tribunal (MRPC 3.5(c) deals with "undignified and discourteous conduct toward the tribunal"); and,
- some violations of MRPC 6.5 (requiring a lawyer to treat with courtesy and respect all persons involved in the legal process).

Additionally, alternative versions of Standard 5.13 are published. One (Alternative B – the ADB proposal) contains a reference to lawyer mishandling of third parties' funds; the other (Alternative A) does not. Also, Alternative A (the Alternate Proposal) does not address dishonest conduct and deals only with criminal conduct, and, as to that criminal conduct, calls for a reprimand even when fitness to practice is not implicated.

Criminal Conduct: The ADB believes that the ADB/ABA proposal most appropriately captures the ranges of discipline for criminal conduct by lawyers. The Board supports published Standard 5.11(a), but does not believe Standards 5.12(a) or 5.13(a) (Alternative A) are workable or reflective of sanctions sought by the AGC or consistent with decisions by hearing panels, the ADB or the Court.

Dishonest Conduct: The published standard's departures from ADB/ABA proposal will cause various problems in application and are not necessary to deal severely with lawyer dishonesty.

MRPC 3.5 & 6.5 Violations: The ADB strongly and respectfully urges that the drafting of standards for these rule violations be deferred to allow the development of caselaw. As more of these cases accumulate, the sanctions and rationales can be catalogued, analyzed and eventually distilled into proposed standards. The standards for these violations should also be housed someplace other than Standard 5.1 (perhaps Standard 6.2 or 7.0).

More detailed comments in support of these positions are set forth below.

II. Criminal Conduct

ABA Standard 5.1 was probably intended to deal with criminal conduct by dividing it into three classes. We say "probably" because of an apparent drafting omission in ABA Standard 5.13 which the Board sought to remedy in its proposal. The three classes of criminal conduct may be described as follows:

(1) disbarment for serious crimes involving certain conduct enumerated in standard 5.11(a) [the published, ADB, and alternative standards are all in accord as to 5.11(a).];

(2) suspension when a lawyer knowingly engages in criminal conduct not enumerated in 5.11(a) but which nonetheless is a serious adverse reflection on the lawyer's fitness;

comment continued . . .

(3) reprimand for certain offenses which, though relatively minor, reflect adversely to some degree on the lawyer's fitness.

The approach taken in Michigan generally follows this scheme. The AGC does not pursue discipline for criminal violations which do not adversely reflect upon a lawyer's fitness to practice (and there are some). Some minor criminal matters may reflect adversely on fitness, but not to such a degree that suspension is required. This is a relatively rare instance, but there are some examples. Most of the criminal convictions filed by the Grievance Administrator are for crimes that clearly warrant (and receive) revocation or suspension under the current Standard 5.1.

Published Standard 5.11(a) is substantially similar to the ADB proposal and the Alternative proposal. Criminal violations that are a serious adverse reflection on fitness to practice should result in disbarment, and most do because they fall within Standard 5.11(a).

Published standard 5.12(a) represents a significant departure from the ABA approach, and from Michigan precedent. Published Standard 5.12(a) generally recommends suspension for *any* criminal violation that reflects adversely on a lawyer's fitness (the ABA/ADB approach requires a serious adverse reflection and knowing violation). However, there are some crimes, generally misdemeanors, that appropriately receive reprimands even though they nonetheless reflect adversely on the respondent's fitness to practice law to some degree. For example, *Grievance Administrator v Fink (After Remand)*, No. 96-181-JC (ADB 2001), lv den 465 Mich 1209 (2001), was the subject of much litigation at the panel, Board and Supreme Court levels, and ultimately resulted in a reprimand for the misdemeanor conviction of assault (shoving another attorney at a deposition). See also, *Grievance Administrator v Howell (After Remand)*, 94-50-JC (ADB 1998), lv den 460 Mich 1205 (1999).

Finally, Published Standard 5.13 (Alternative A) provides that "[r]eprimand is generally appropriate when a lawyer engages in criminal conduct that does not contain the elements listed in Standard 5.11," i.e., any other criminal conduct. Even where there is no adverse reflection on a lawyer's fitness to practice, some discipline (a reprimand) would be the presumptive consequence of a lawyer's criminal act under this published standard. The published standards do not reflect the actual or appropriate practice with respect to low-end criminal conduct. They are based on the Alternative Proposal which was avowedly drawn to be consistent with *Grievance Administrator v Deutch*, 455 Mich 149 (1997). However, the published standards are not in fact in line with *Deutch*, or other decisions, or sound practice.

Generally, criminal conduct not reflecting adversely on a lawyer's fitness does not in fact result in a reprimand, and that is because it does not even lead to the filing of formal charges by the Grievance Administrator. The ADB receives notice of lawyer convictions under MCR 9.120 whether or not they are subsequently acted upon by the Grievance Administrator. A quick review of some of these includes recent convictions against attorneys for crimes such as

- Operating a watercraft without a personal floatation device for each passenger.
- Hunting without duck stamps. (According to the notice, the attorney bought combination deer, small game and migratory bird license on advice of salesperson; DNR officer, knowing the seller was dispensing the wrong advice, ticketed attorney anyway.)
- "Foul-hooking" a spawning salmon.
- Improper plates on a trailer (attorney had two boat trailers, one for a sailboat and one for a motor boat; renewed license for wrong trailer).
- Walking a dog without a leash (a misdemeanor in the municipality at issue)

comment continued . . .

The Grievance Administrator appropriately declined to seek discipline for those crimes and many others.

The published standard seems to be based on a reading of *Deutch* which would hold all crimes to constitute lawyer misconduct per se. It is quite true that the three-Justice lead opinion in *Deutch* can be read in this way. However, the other three justices participating (one concurring and two dissenting) read the rules to require an adverse reflection on fitness to practice before the lawyer crime would constitute professional misconduct. Indeed, even the lead opinion, in one passage, seems to indicate that not all criminal conduct translates ineluctably to professional misconduct. *Deutch*, 455 Mich at 162 n 11 (even when a proceeding is based on a conviction, "neither the hearing panels nor the board are absolved of their duty, under [the rules], to make appropriate and sufficient findings of fact to determine in each case whether professional misconduct is committed").

Morever, even if every criminal violation is held to be misconduct, this does not mean that discipline must be imposed. Indeed, the lead opinion in *Deutch* referenced with approval the fact that "in the first ten months of 1996, only two out of twelve drunk driving cases were approved by the Attorney Grievance Commission for formal disciplinary proceedings." *Deutch*, 455 Mich at 167 n 18. And, *Deutch* declares that the adjudicative side of the discipline system (the panels, the Board and the Court) have the power to enter an "order of discipline [which] may, in fact, order no discipline at all." *Deutch*, 455 Mich 163.

The comment in support of the alternative proposal asserts that: "In *Deutch*, the respondent received a reprimand for Operating a Motor Vehicle Under the Influence of Intoxicating Liquor." Actually, Mr. Deutch received an order of "no discipline." *Grievance Administrator v Deutch (After Remand)*, 94-44-JC (ADB 1998) (affirming hearing panel order of reprimand following the Court's remand to the Board), lv den 460 Mich 1205 (1999). The Board's opinion after remand in *Deutch* states:

> We recognize that under *Deutch* a lawyer's criminal conduct will be considered "misconduct" irrespective of whether it "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer." MRPC 8.4(b). However, there can be no question that these are relevant considerations in determining the level of discipline, if any, to be imposed. Indeed, the concept of "fitness" is central to the function of regulating the bar. It is a prerequisite to acquiring (State Bar Rule 15, §1), maintaining (MCR 9.103(A)), and regaining (MCR 9.123(B)(7)) the license to practice law. "Fitness" is arguably the touchstone or key variable to be addressed whenever the level of discipline is assessed. See, e.g., Standards for Imposing Lawyer Sanctions (ABA, 1991), §9.1. [*Id.*, p 7 n 5.]

Deutch was one of a pair of consolidated cases. The companion case involved an attorney who had two convictions for operating a motor vehicle while impaired, the second offense occurring near the end of the probationary term for the first offense. After remand from the Court, a hearing panel entered an order imposing no discipline. On review the Board reprimanded the attorney, stating that while the convictions "do not in themselves reflect adversely upon respondent's character and fitness as a lawyer . . . , [w]e cannot . . . overlook respondent's violation of a probation order." *Grievance Administrator v Howell* (After Remand), 94-50-JC (ADB 1998), lv den 460 Mich 1205 (1999).

The Court has, post-*Lopatin*, quoted with approval the commentary to Standard 5.1 which states: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be

comment continued . . .

professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category." *Grievance Administrator v Fink*, 462 Mich 198 (2000). Nearly all of the 40-plus states following the Model Rules have some version of Model Rule of Professional Conduct 8.4(b) which defines as misconduct only that criminal conduct which reflects adversely on a lawyer's fitness to practice law. The Administrator's practice takes this factor into account, and the Proposed Michigan Rules published by the Court (ADM File No 2003-62) retain this formulation.

The ADB believes that the Michigan Standards should reflect the actual practices and policies of the discipline agencies and the Court in imposing discipline if the Standards are to achieve the Court's goals of promoting consistency, predictability and articulation of the pertinent factors in sanctions determinations. Accordingly, we urge the adoption of the ADB/ABA proposed Standard 5.1.

In summary, the ADB believes that its proposed Standard 5.1 more accurately and appropriately deals with sanctions for criminal conduct. There has been no showing that the recommendations set forth in the ABA Standard have produced inappropriate results. And, as to the versions of Standard 5.13 published for comment:

- 5.13 (Alternative A) recommends reprimand for certain criminal conduct. It either overlaps with Standard 5.12(a) (which omits the word "seriously" and recommends suspension for the same conduct in 5.13 Alt A), or, more likely, it recommends reprimand for criminal conduct which does not reflect adversely on a lawyer's fitness to practice, contrary to MRPC 8.4(b), ABA Model Rule 8.4(b), ABA Standard 5.1, and Michigan practices and precedents.

- 5.13 (Alternative B) requires adverse reflection on fitness, but then definitely appears to overlap with 5.12(a) due to the omission of "seriously" from the latter.

III. Dishonest Conduct

Published standard 5.11(b) deletes the word "intentional" from the standard proposed by the ADB. This renders published Standard 5.11(b) incongruous with published Standard 5.11(a) which speaks of intentional misrepresentation, fraud and the like. Perhaps this deletion was premised upon the logic behind published Standard 4.6 (please see our comments regard deletion of the word "knowingly" before the word "deceives" in Standard 4.6). The ADB believes the its proposed Standard 5.11(b) better articulates the relevant state of mind, avoids ambiguity, and preserves the hierarchy of pertinent factors which leads to appropriately severe sanctions for dishonesty.

Published Standard 5.12(b) deletes the word "knowing" before the word "misrepresentation" in the ADB proposal. This deletion also frustrates the scale which yields an appropriate recommended sanction based on the lawyer's state of mind.

Published Alternative A's Standard 5.13 is silent as to dishonest conduct. Presumably this would mean that reprimand is not generally recommended for any dishonest conduct. The ADB agrees with this position, but would approach the drafting differently. Dishonest conduct should and almost always does result in a more severe sanction, but, as drafted, the published Alternative A will contain a gap much like the one in ABA Standard 5.1 which has caused puzzlement among regulators for years. In other words, if reprimands are to be sparingly recommended, then it is better to say so and put this into

comment continued . . .

a verbal formula. The ADB proposal seeks to do this by withholding reprimand unless the dishonesty reflects on fitness only to a "slight degree." One can quarrel with the wording, but we submit that the concept is quite sound and that published Alternative B's Standard 5.13(b) should be adopted along with ADB proposed Standards 5.11(b) and 5.12(b).

ADB proposed Standard 5.13(b) should also be modified. Further reflection stimulated by the State Bar of Michigan's Special Committee on Grievance leads us to conclude that the ABA language is preferable to the ADB's original proposal in one respect. The word "knowingly," which was stricken, should be reinserted. The ADB would then suggest removing the word "knowing" which was inserted before the word "misrepresentation." Thus, the Board now recommends that Standard 5.13(b) read as follows:

> a lawyer knowingly engages in any conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law to a slight degree; or

Members of the Grievance Committee suggested that the concerns which prompted the Board to modify "misrepresentation" with the word "knowing" may be present with respect to words such as "fraud" in light of definitions set forth in some statutes and caselaw. We note also that the concern voiced in our comment to Published Standard 4.6 is present here as well, i.e., "knowing" is a significant modifier for the word "deceit."

IV. Misuse & Mishandling of Third-Party Funds or Property

Published Standard 5.13(c) (Alternative B) still contains a standard regarding lawyer mishandling of third party (non-client) property. The ADB believes that this is the better course, but none of the other subordinate standards in 5.0 (i.e., 5.11 and 5.12) refer to such conduct. The ADB respectfully urges that the provisions regarding lawyer mishandling of third party property be restored to this standard for the reasons set forth in the above comments upon published Standard 4.1. Thus, the Board supports adoption of Alternative B to Proposed Standard 5.13. However, unless the ADB's version of Standards 5.11 and 5.12 are also adopted, Alternative B would be inconsistent with the remainder of Standard 5.1: published Alternative B contains a reference to property of another entrusted to the lawyer while no other sub-section of Standard 5.1 does, the issue having been removed to published Standard 4.1 (which the ADB opposes).

V. Standards for violations of MRPC 3.5(c) & 6.5 should be drafted after study and probably be treated under a standard other than Standard 5.1.

Michigan's Rule of Professional Conduct 6.5(a), which does not have a precise counterpart in the ABA Model Rules, directs that "a lawyer shall treat with courtesy and respect all persons involved in the legal process." The rule continues by warning that a lawyer shall take particular care to avoid discourteous or disrespectful conduct based on race, gender, or other protected personal characteristic. The word "mistreats" does not appear in MRPC 6.5. Published Standard 5.1 contemplates only two levels of discipline for a lawyer who knowingly "mistreats" a person involved in the legal process because of the person's race, gender, or other characteristic: (1) disbarment if the lawyer was attempting to gain an advantage in the litigation; or (2) suspension if the lawyer was not attempting to gain an advantage. Published Standard 5.1 does not contemplate the imposition of a reprimand for such conduct. Further, the proposed standard suggests no sanction for conduct which may be described as discourteous or disrespectful but is not based on race or gender.

comment continued . . .

Most of the Michigan cases in which discipline has been imposed under MRPC 6.5 involve incivility toward opposing counsel or witnesses in depositions or other legal settings without an explicit reference to race, gender or other characteristics. Such actions may also constitute conduct prejudicial to the administration of justice. See Michigan RPC 8.4(c) and Model RPC 8.4(d). The recently adopted comment [3] to Model Rule 8.4, which comment provides:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

In the future, there may be more reported discipline cases from other jurisdictions which could provide precedent for some MRPC 6.5 violations in light of this recently adopted comment to the Model Rules.

MRPC 3.5(c) prohibits a lawyer from engaging in "undignified or discourteous conduct toward the tribunal." Published standard 5.1 contemplates that a lawyer who exhibits discourtesy toward a tribunal will be disbarred if he or she was attempting to gain an advantage in the litigation or will be suspended if there was no attempt to gain an advantage. The published standard sets forth no circumstances in which a reprimand would be appropriate when a lawyer engages in conduct found to be "undignified" or "discourteous" toward a tribunal.

The comments supporting the alternative proposal include no caselaw support or other insight regarding the proposals to: (1) omit the type of conduct often prosecuted under MRPC 6.5(a), i.e., discourtesy toward opposing counsel which is not based on race or gender; (2) use the word "mistreats" which is not employed or defined elsewhere in MRPC 6.5; and (3) incorporate the apparent assumption that cases involving discourtesy toward a person or a tribunal will, in the absence of mitigating factors, result in either disbarment or suspension.

The ADB strongly recommends that Standards for violations of MRPC 3.5(c) & 6.5 should be drafted after more caselaw has accumulated, at which time a study of the cases and pertinent factors may be conducted and a logical place to incorporate such standards may be explored.

5.2 FAILURE TO MAINTAIN THE PUBLIC TRUST

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
The following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official in violation of MCR 9.104(A)(1), MRPC 3.8, 6.4, or 8.4(c) or (d). 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position or either states or implies that the lawyer may improperly influence another in an official or governmental position to obtain a benefit or advantage for the lawyer or another. 5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, resulting in prejudice to the administration of justice. 5.23 Reprimand is generally appropriate when: (a) a lawyer in an official or governmental position negligently fails to follow proper procedures or rules (with the exception of the duties set forth in MRPC 6.4, which cannot be violated by simple negligence), resulting in prejudice to the administration of justice; or (b) a prosecutor or assistant prosecutor violates the duties set forth in MRPC 3.8(a)-(e) and the violation does not result in prejudice to the administration of justice.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official: 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process. 5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process. 5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.	The following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official in violation of MCR 9.104(1); MRPC 3.8; 6.4; and, 8.4(c) and (d). 5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position or either states or implies that the lawyer may improperly influence another in an official or governmental position to obtain a benefit or advantage for the lawyer or another. 5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules which results in prejudice to the administration of justice. 5.23 Reprimand is generally appropriate when: (a) a lawyer in an official or governmental position negligently fails to follow proper procedures or rules (with the exception of the duties set forth in MRPC 6.4 which cannot be violated by simple negligence) which results in prejudice to the administration of justice; or, (b) a prosecutor or assistant prosecutor violates the duties set forth in MRPC 3.8(a)-(e) and the violation does not result in prejudice to the administration of justice.

ADB Comment

Note: The Alternative Proposal was published with minor changes.

Summary of ADB Position: The Board urges adoption of the ADB/ABA proposed standard.

comment continued . . .

Discussion:

Again, the absence of the injury factor from this portion of the standards leads to serious problems. In this case, the alternative proposal and published standard attempt to use "prejudice to the administration of justice," a term that covers many types of conduct, to help substitute for the gradations that have been jettisoned with the injury factors. For example, published Standard 5.22 and 5.23(a) and (b) attempt to use prejudice to the administration of justice to distinguish cases. But, this attempt cannot succeed. Except when a case deals with stating or implying an ability to improperly influence government officials (mentioned only in Standard 5.21), all of the cases covered by Standard 5.2 must involve prejudice to the administration of justice. This is because that term is used in the opening paragraph which applies to all of the subordinate standards: "The following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice . . . ." Thus, the references to prejudice in Standards 5.22 and 5.23(a) are redundant and cannot aid in distinguishing disbarments from suspensions or reprimands. Moreover, the language of Standard 5.23(b) (purporting to apply to rule violations which do not involve prejudice to the administration of justice) is at war with the above-quoted language in the opening paragraph of Standard 5.2.

Unlike the ADB/ABA Standards, the published disbarment standard (5.21) refers to violations of MRPC 8.4(d) (stating or implying the ability to improperly influence a government official). Since no other Standard in 5.2 refers to these rule violations, it appears that disbarment is the only alternative when Rule 8.4(d) has been violated. Given the nature of the misconduct and its impact on the administration of justice and public confidence therein, many such violations will certainly be serious enough to warrant disbarment. However, there may be instances in which suspension or reprimand may be appropriate under all of the circumstances.

Another potentially troublesome feature of the published standard is the existence of a special standard for prosecutors. The basis for this departure from the ABA Standard is not explained or apparent. Published Standard 5.23(b) is the only one that mentions prosecutors. The apparent result would seem to be that discipline for the rule violations enumerated therein would be capped at a reprimand no matter how egregious the violation. It is also not clear why the rules mentioned in that standard are singled out.

Finally, the comment in support of the Alternate Proposal (which was published) asserts that "The ADB's proposed Standard 5.23 criminalizes a negligent violation of MRPC 6.4, which is inappropriate." As we have stated above, the Standards, by definition, simply cannot do this. The Rules of Professional Conduct "define proper conduct for purposes of professional discipline." Comment, Rule 1.0. See also, MRPC 1.0(b) and (c), MRPC 8.4(a), and MCR 9.104(4). Published Standard 1.3 makes it clear that "These standards are designed for use in imposing a sanction or sanctions following the entry of a finding of misconduct." The ADB's proposed Standard 1.3 (not published), as revised herein, would make the purpose and scope of the standards even more clear:

> These standards are designed for use in imposing a sanction or sanctions following a determination by a preponderance of the evidence or acknowledgment that a member of the legal profession has violated a provision of the Michigan Rules of Professional Conduct or subchapter 9.100 of the Michigan Court Rules. *Descriptions of misconduct in these standards do not create independent grounds for determining discipline*. [Emphasis added.]

comment continued . . .

Not all rule violations deserve prominent or even equal coverage in the standards. Published Standard 5.23(a) will be applied in the overwhelming majority of cases to rules other than MRPC 6.4, but the standard published for comment goes out of its way to call attention to the fact that one may not negligently violate Rule 6.4. The ADB believes that a hearing panel would appropriately distinguish the purposes of the rules from those of the standards and apply both in a manner that would achieve an appropriate result without language such as that in this published standard. In any event, inasmuch as "there are no reported decisions disciplining a lawyer for violating the operative part of Rule 6.4" (Annotated Model Rules of Professional Conduct (5th ed), p 524), perhaps the published standard emphasizes this rule unduly.

6.0 Violations of Duties Owed to the Legal System
6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION TO A TRIBUNAL

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a tribunal in violation of MRPC 3.3: 6.11 Disbarment is generally appropriate when a lawyer knowingly makes a false statement, submits a false document, or improperly fails to disclose a material fact or adverse controlling authority, known to the lawyer and not disclosed by opposing counsel, to obtain a benefit or advantage for the lawyer or another. 6.12 Suspension is generally appropriate when: (a) a lawyer engages in the conduct described in Standard 6.11 but does not do so to obtain a benefit or advantage for the lawyer or another; or (b) a lawyer comes to know of the falsity of material evidence the lawyer has offered to a tribunal but fails to take reasonable remedial measures. **ALTERNATIVE A TO PROPOSED STANDARD 6.13** 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents submitted to a tribunal are false or in taking remedial action when material information is being withheld. **ALTERNATIVE B TO PROPOSED STANDARD 6.13** 6.13 Reprimand is generally not appropriate when a lawyer engages in false statements, fraud, and misrepresentation to a tribunal.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a ~~court~~ tribunal: 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the ~~court~~ tribunal, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury ~~to a party, or causes a significant or potentially significant adverse effect on the legal proceeding~~. 6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the ~~court~~ tribunal or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury ~~to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding~~. 6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents submitted to a tribunal are false or in taking remedial action when material information is being withheld and causes injury or potential injury ~~to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding~~.	The following sanctions are generally appropriate in cases involving conduct that involves dishonesty, fraud, deceit, or misrepresentation to a tribunal in violation of MRPC 3.3 6.11 Disbarment is generally appropriate when a lawyer knowingly makes a false statement, submits a false document, or improperly fails to disclose a material fact or adverse controlling authority known to the lawyer and not disclosed by opposing counsel to obtain a benefit or advantage for the lawyer or another. 6.12 Suspension is generally appropriate when: (a) a lawyer engages in the conduct described in Standard 6.11 but does not do so to obtain a benefit or advantage for the lawyer or another; or, (b) a lawyer comes to know of the falsity of material evidence the lawyer has offered to a tribunal but fails to take reasonable remedial measures. 6.13 Reprimand is generally not appropriate when a lawyer engages in false statements, fraud, and misrepresentation to a tribunal.

ADB Comment

Note: Alternative A is the ADB's proposed Standard 6.13 absent references to injury. The remainder of the standard published for comment is the Alternative Proposal except that the published standard retained "conduct prejudicial to the administration of justice" in the opening paragraph.

comment continued . . .

Summary of ADB Position: The Board urges adoption of the ADB/ABA proposed standard.

Discussion:

I. Failure to Disclose Adverse Authority.

Standard 6.11 has been expanded to recommend disbarment when a lawyer fails to disclose adverse controlling authority known to the lawyer and not disclosed by opposing counsel to obtain a benefit for the lawyer or another. Published Standard 6.1 does not contemplate the availability of reprimand when a lawyer is disciplined for failure to disclose controlling authority. No caselaw support for this new standard has been supplied, and it may be worthwhile to consider (1) how other jurisdictions have treated failure to disclose controlling authority; and (2) whether disbarment should be considered the presumptive level of discipline for this ethical lapse.

II. Recalibration and its Potential Consequences.

The published standard would recommend disbarment when a lawyer "knowingly" makes a false statement, submits a false document, or does other things. The ABA standards recommend disbarment when a lawyer intends to deceive a tribunal. No cases have been offered to demonstrate that the current standards are not recommending appropriate sanctions for this type of conduct. The ADB recently increased discipline from a 3½ year suspension to disbarment under Standard 6.11 (and 5.11) in a case involving the submission of false statements, including a phony order, to a court. *Grievance Administrator v G. Scott Stermer*, 00-26-AI; 01-3-JC (ADB 2003). The "intent to deceive" language of the current standard posed no obstacle to this obviously correct result. In another case, where the issue in fact was whether the respondent's deception was knowing or intentional, the ADB again increased discipline from a 3 year suspension to disbarment, applying Standard 6.11 instead of Standard 6.12. *Grievance Administrator v Edgar J. Dietrich*, 99-145-GA (ADB 2001). The *Dietrich* case involved a respondent who induced and allowed a suspended lawyer to handle cases in the respondent's firm and held the suspended lawyer out to courts as an attorney. In addressing the proper application of the sanctions, the ADB modified the panel's order of suspension and stated: "Having determined the nature of the respondent's mental state, i.e., that respondent acted with intent, analysis under the ABA Standards leads inexorably to the three Standards identified as applicable by the Administrator [5.1(b); 6.11; and 7.1]." *Dietrich, supra*.

In the absence of any demonstration that the standards have been producing faulty results, one might ask whether adopting the new language in published Standard 6.12 is necessary. One might also ask whether it will be helpful. Published Standard 6.12(a) seems to apply to lawyers who lie for no reason at all (i.e., who do "not do so to obtain a benefit or advantage"). Lawyers who lie without intending to obtain a benefit or advantage are probably few, and they probably have serious psychological problems that will manifest themselves in different ways and lead to prosecutions for other violations. Accordingly, the "benefit or advantage" language may not serve its apparent purpose of distinguishing suspension conduct from disbarment conduct.

III. Standard 6.13

The comment supporting the alternative proposal claims that ADB proposed standard 6.13 "criminalizes conduct which does not violate the MRPC," i.e., negligent misstatements or presentation of evidence to a tribunal. As we have stated elsewhere, the standards do not give rise to professional

comment continued . . .

obligations. They cannot create a basis for a finding of misconduct. The ADB agrees that where conduct is not prohibited *anywhere* in the Rules of Professional Conduct it would not make sense for a standard to purport to discuss the sanction for such a nonexistent violation. But that is not the case here.

The last part of the Standard 6.13 (negligently failing to take remedial action) seems quite consistent with the last paragraph of MRPC 3.3(a) ("If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures"). A lawyer who fails to take reasonable remedial measures might conceivably do so intentionally, knowingly, or negligently.

Also, the Alternative Proposal and published Standard 6.1 are focused on MRPC 3.3. However, ABA Standard 6.1 has been applied in cases involving violations of the state equivalents of ABA Model Rules 3.1, 8.4(b), and 8.4(d), and DR 1-101(A). See, *In Re Coker*, 2002 Ariz Lexis 33 (Ariz 2002) (reprimanding lawyer for filing pleading without sufficient factual inquiry in violation of MRPC 3.1 and 8.4(d) [conduct prejudicial to the administration of justice]), *Colorado v Kusick*, 82 P3d 389 (Colo 2003) (public censure for directing notarization of signatures in absence of affiant, a misdemeanor and conduct prejudicial to the administration of justice, in violation of MRPC 8.4(b) and 8.4(d)), and *Colorado v North*, 964 P2d 510 (Colo 1998) (public censure for recklessness in answering question falsely on application to Colorado Bar in violation of DR 1-101(A) which the Court noted was replaced by MRPC 8.1).

The ADB does not agree with the assumption implicit or explicit in the published and alternative standards that each standard is precisely drawn to cover only the rule violations set forth in the appendix. Also, analogies to other standards covering similar conduct may afford helpful guidance to parties and hearing panels. Conceptualizing the standards as precise pigeon holes is not only inaccurate but will frustrate beneficial application of the current standards.

Again, the ADB urges an incremental and cautious approach to revision so that changes will be conscious rather than unintended. We also urge that the court adopt the ADB's proposed footnote to the appendix to encourage the parties and hearing panels to familiarize themselves with potentially applicable standards other than those cross-referenced to the Rules of Conduct in the appendix. In the years since 2000, when the Court directed usage of the Standards in *Lopatin*, hearing panels have helped the ADB discover flaws and gaps in the Standards. This process can be expected to continue and the ADB plans to institutionalize the process of review and improvement of the standards on a continuing basis, perhaps through a standing committee of the ADB which will work with and invite comment from parties such as AGC staff, hearing panelists, and interested members of the Bar.

Finally, Alternative B's Standard 6.13 says that "reprimand is generally not appropriate when a lawyer engages in false statements, fraud, and misrepresentation to a tribunal." (Emphasis added.) This probably is true, but it would be more helpful to follow the Standard's pattern of articulating when, if ever, reprimand would be appropriate. Also, Alternative B's scope seems narrower than the ADB proposal. The ADB's proposed Standard 6.13 would also address sanctions for failing to take remedial action when material information is being withheld.

6.2 ABUSE OF THE LEGAL PROCESS

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists, in violation of MCR 9.104(A)(1), MRPC 3.1, 3.2, 3.4, 3.6, 4.4, or 8.4(c). 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule to obtain a benefit or advantage for the lawyer or another, or violates MRPC 3.4(a) or (b). 6.22 Suspension is generally appropriate when: (a) a lawyer knowingly violates a court order or rule without the intent to obtain a benefit or advantage for the lawyer or another but resulting in prejudice to the administration of justice; or (b) a lawyer knowingly brings or defends a matter without a basis that is not frivolous; or (c) a lawyer knowingly fails to expedite litigation consistent with the interests of the client. 6.23 Reprimand is generally appropriate when: (a) a lawyer violates MRPC 3.4(d)-(f) or 3.6; or (b) a lawyer negligently brings or defends a matter without a basis that is not frivolous; or (c) a lawyer negligently fails to expedite litigation consistent with the interests of the client.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists: 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding. 6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. 6.23 Reprimand is generally appropriate when a lawyer negligently falls to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.	The following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists in violation of MCR 9.104(A)(1) MRPC 3.1; 3.2; 3.4; 3.6; 4.4; and, 8.4(c). 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule to obtain a benefit or advantage for the lawyer or another, and MRPC 3.4(a) and (b). 6.22 Suspension is generally appropriate when: (a) a lawyer knowingly violates a court order or rule without the intent to obtain a benefit or advantage for the lawyer or another but which results in prejudice to the administration of justice; or, (b) a lawyer knowingly brings or defends a matter without a basis which is not frivolous; or, (c) a lawyer knowingly fails to expedite litigation consistent with the interests of the client. 6.23 Reprimand is generally appropriate when: (a) a lawyer violates MRPC 3.4(d)-(f) or 3.6; or, (b) a lawyer negligently brings or defends a matter without a basis which is not frivolous; or, (c) a lawyer negligently fails to expedite litigation consistent with the interests of the client.

ADB Comment

Note: The Alternative Proposal was published with minor changes.

Summary of ADB Position: The ADB recommends adoption of the ADB/ABA proposed standard. Although the published standard suggests some avenues for improving upon the ABA standard, further study and drafting must be done to produce a workable standard that will not result in unintended consequences.

comment continued . . .

Discussion:

I. Introduction & Overview

Standard 6.2 applies to various rule violations. The standard published for comment commendably attempts to provide more specificity with respect to some violations (e.g., violations of MRPC 3.4(d)-(f), 3.1, 3.2, and 3.6). However, in modifying Standards 6.22 and 6.23, certain language found in Standard 6.21 has been deleted, thus creating an apparent gap in coverage for violations of rules such as MRPC 4.4, and, in some instances, conduct prejudicial to the administration of justice (which is mentioned only in Standard 6.22(a)). Also, it appears that violations of MRPC 3.4(d)-(f) and 3.6 are capped at reprimand, even if such violations are intentional and cause significant injury.

II. Effects of Failure to Consider Injury

The published standard demonstrates the detrimental consequences of eliminating injury as a factor in Section D of the Standards. The deletion of the injury factor causes the standard published for comment to recommend draconian sanctions. Consider the following situations:

- A lawyer is waiting in Oakland Circuit Court on motion day. She is as prepared as she can possibly be for the motion she is about to argue. She is checked in, not next, but is told "it shouldn't be too long." She stays in the courtroom to gauge the judge's disposition and to pick up any useful tips from the cases before her. Aware of Local Rule 8.115's prohibition against all "conversations, and reading of books, newspapers, and periodicals, except as necessary for the trial of an issue," she sneaks a peak at a Wall Street Journal article on retirement planning and actually reads several paragraphs until she is caught by the bailiff;

- Same facts, except the lawyer is reading an ALR annotation or a legal periodical in preparation for a complaint he will be drafting in another case that afternoon;

- A lawyer works on and polishes a brief which is subject to 20 page limitation and, in order to meet the limitation, he shrinks the font to 11.8 point in knowing violation of an order requiring 12 point type, all to avoid having to edit the brief again.

In all three situations, the lawyer has "knowingly violate[d] a court order or rule to obtain a benefit or advantage for the lawyer or another." Therefore, upon a finding of misconduct, disbarment would be recommended under the published standard.

The injury factor helps achieve proportional sanctions recommendations in Standard 6.2. (The ADB's recommendation to retain injury and potential injury as factors in Section D's process of sorting misconduct by degrees of seriousness is discussed in the comments on published Standard 3.0 and elsewhere.)

III. Conduct Prejudicial to the Administration of Justice

Published Standard 6.22(a) recommends that suspension is generally appropriate when a lawyer knowingly violates a court order, does not intend to benefit anyone, but does prejudice the administration of justice. It is difficult to conceive of a knowing rule violation done without an intended benefit, but, assuming that scenario could arise, one must ask whether the existence of "prejudice to

comment continued . . .

the administration of justice" is an adequate delimitation. The phrase may sound more precise than it is. It may involve interference with the judicial process. See, e.g., *Grievance Administrator v Fried*, 456 Mich 234; 570 NW2d 262 (1997) (counsel's recusal scheme interfered with the proper assignment of cases). However, it is a catchall provision that is charged in virtually (if not literally) every formal complaint filed with the ADB. It is a proscription "written broadly . . . to cover a wide array of offensive lawyer conduct." 1 *Restatement of The Law Governing Lawyers, 3d*, § 5, comment c, p 50. Conduct prejudicial to the administration of justice has even been found where a judge became "verbally abusive and insulting" to an airline employee and "grasped her braided hair at the nape of the neck, causing her head to jerk backwards." *In Re O'Brien*, 441 Mich 1204; 494 NW 2d 459 (1992). Again, consideration of injury at this point in the process of applying the standards would help achieve more proportional and consistent sanctions.

IV. Apparent Gaps – Various Rule Violations

Published Standard 6.2 applies to violations of MRPC 3.1, 3.2, 3.4, 3.6, 4.4, and to conduct prejudicial to the administration of justice (MCR 9.104(1) and MRPC 8.4(c)). The published proposal drops the language "court order or rule" from the reprimand standard (6.23). The phrase is also used more restrictively in published Standard 6.22. Published Standard 6.21 seems to have followed the approach of the ADB and the ABA. That is, use of the language "when a lawyer violates a court order or rule" is intended to cover all of the rule violations enumerated either in the opening paragraph of the published proposal or in the appendix to the ADB proposal. With minor modifications the phrase is used throughout the ADB/ABA proposal. Dropping it and inserting more specific language targeted toward only some of the rule violations covered by the standard could create unintended consequences. Specifically, cases involving other rules or violation of a court order may appear to have fallen through the cracks.

The foregoing having been said, the ADB notes that published Standards 6.22(b) & (c) and 6.23(b) & (c) probably come fairly close to an appropriate sanctions recommendation for the offenses treated therein. The ADB plans to explore the revision of the standards, and Standard 6.2 may indeed benefit from refinement. However, the Board is not at all convinced that the apparent cap of a reprimand for all violations of MRPC 3.4(d), (e) and (f) and MRPC 3.6 is appropriate.

V. Conclusion

As stated above, the ADB plans to explore further revisions to the standards on a continuing basis, and Standard 6.2 may benefit from revision. However, the ADB believes that published Standard 6.2, while having some potentially beneficial elements, would be confusing and difficult to apply and likely to produce unintended consequences and disproportionate sanctions recommendations. Accordingly, the ADB urges adoption of ABA Standard 6.2 as modified in the ADB proposal.

6.3 IMPROPER COMMUNICATIONS WITH INDIVIDUALS IN THE LEGAL SYSTEM

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror, or other official by means prohibited by law or in violation of MRPC 3.5(a) or (b), 4.2, or 4.3: 6.31 Disbarment is generally appropriate when a lawyer: (a) intentionally tampers with a witness in an attempt to interfere with the outcome of the legal proceeding; or (b) makes an ex parte communication with a judge or juror in an attempt to affect the outcome of the proceeding; or (c) improperly communicates with someone in the legal system other than a witness, judge, or juror in an attempt to influence or affect the outcome of the proceeding. 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper. 6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law: 6.31 Disbarment is generally appropriate when a lawyer: (a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding. 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding. 6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.	The following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law or violates MRPC 3.5(b) and (c); 4.2; and, 4.3: 6.31 Disbarment is generally appropriate when a lawyer: (a) intentionally tampers with a witness in an attempt to interfere with the outcome of the legal proceeding; or, (b) makes an ex parte communication with a judge or juror in an attempt to affect the outcome of the proceeding; or, (c) improperly communicates with someone in the legal system other than a witness, judge, or juror in an attempt to influence or affect the outcome of the proceeding. 6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper. 6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system.

ADB Comment

Note: The Alternative Proposal was published with grammatical and other changes. It follows the ADB/ABA Standards except that the references to injury and interference with the outcome of a legal proceeding are deleted.

comment continued . . .

Summary of ADB Position: The ADB recommends adoption of the ADB/ABA proposed standard.

Discussion:

The published Standard deletes references to injury (including interference with a proceeding) from the ABA Standards, but otherwise follows the language of the ADB/ABA Standards. It is difficult to determine what the impact of such a modification would be without surveying cases and spending considerable time envisioning hypothetical situations. The caselaw in Michigan on ex parte contacts is somewhat sparse. However, hearing panels, the Court and the Board have liberally construed "injury" when deciding cases involving ex parte contacts. In *Grievance Administrator v Lopatin*, 92-224-GA (ADB 2001), lv den 644 NW 2d 758 (2002), the Board quoted a passage from the Court's opinion remanding the matter for consideration under the ABA Standards. In that passage, the Court adopted an expansive view of "injury." The Board noted this and stated:

> The Court's broader view is reflected in the Standards' definition of "injury" as "harm to a client, the public, *the legal system*, or the profession" (emphasis added). We have previously quoted a hearing panel''s observation that, "Public confidence in the system is eroded when a litigant gains [ex parte] access to a judge about a pending matter." Grievance Administrator v Sheldon L. Miller, 90-134-GA (ADB 1991). And, the panel in this case recognized that "[e]very unlawful ex parte communication on the merits is injurious to the integrity of the legal system."
>
> We are not presented with evidence of harm to the opposing party in this case, nor does the Administrator argue that the outcome of the *Luszczynski* case was actually interfered with. See Standards 6.31(b) and 6.32. Rather, the Administrator contends that respondent's actions "created serious potential to harm the opposing party, and to the legal process," Petitioner's Supplemental Brief on Discipline, p 10, and aptly sums up the nature of the conduct and its impact:
>
> > The evidence establishes that respondent''s actions, in concert with Judge Bronson, directly impacted the decision making process. In essence, respondent was afforded the opportunity to write a legal opinion which favored his client and reversed the trial court judgment. While the extent of the actual damage to the process may never be known, respondent''s access to the process, disguised by Judge Bronson, threatened substantial harm and tainted the final decision in the matter. [*Id*. pp 12-13.]
>
> Although the proofs do not specify any actual harm to a party, and do not establish that the judge's votes or the path of the law were in fact altered as a result of respondent's ex parte communication, we conclude that the injuries identified by the Court are present. Specifically, the *potential* harm to the opposing party is serious. And, there has been significant actual injury to the legal system in the form of diminished confidence in the impartial administration of justice. [*Grievance Administrator v Lopatin*, 92-224-GA (ADB 2001), lv den 644 NW 2d 758 (2002)]

Because consideration of injury in the manner prescribed by the ABA Standards has not been shown to be faulty, the ADB would not depart from the ABA language at this point. Accordingly, we recommend adoption of the proposed ADB/ABA Standard 6.3.

D. Recommended Sanctions

7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following sanctions are generally appropriate in cases involving conduct in violation of MRPC 1.14, 1.16, 2.1, 2.3, 5.1 - 5.6, 6.2, 7.1 - 7.5, 8.1, 8.3, or 8.4(e). 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional to obtain a benefit or advantage for the lawyer or another. 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional but does not do so in order to obtain a benefit or advantage for the lawyer or another. 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct. 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system. 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.	The following sanctions are generally appropriate in cases involving conduct in violation of MRPC 1.14; 1.16; 2.1; 2.3; 5.1 - 5.6; 6.2; 7.1 - 7.5; 8.1; 8.3; and 8.4(e). 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional to obtain a benefit or advantage for the lawyer or another. 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional but does not do so in order to obtain a benefit or advantage for the lawyer or another. 7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional.

ADB Comment

Note: The Alternative Proposal was published. It is in essence the ADB proposal without references to injury or to excessive fee cases (MRPC 1.5). Excessive fee cases would be treated under the Alternative Proposal's recommended Standard 4.5 (Alternative B to proposed Standards 4.4 & 4.5).

Summary of ADB Position: The ADB recommends adoption of its proposed Standard 7.0.

Discussion: The ADB has criticized ABA Standard 7.0, stating that it "appears to contain some unrelated forms of misconduct which may be more logically grouped elsewhere. For example, it is not clear why unreasonable fees and improper withdrawal do not constitute, primarily, violations of duties owed to clients." (Drafting Notes to ADB Proposed Michigan Standards for Imposing Lawyer Sanctions [June 2002].) The ADB also observed that improper withdrawal (in violation of MRPC 1.16) may be conceived of as a violation of a duty to a client. *Id.*

In line with the ADB's suggestion, the Alternate Proposal would treat excessive fees under a separate standard within overall Standard 4.0. However, for reasons stated elsewhere, the ADB opposes the proposed standard on excessive fees and recommends further analysis to determine the appropriate content and placement of such a standard, and whether such violations should be treated with sanctions for failure to return an unearned fee (MRPC 1.16(d)) and/or other related violations.

D. Recommended Sanctions

8.0 PRACTICE OF LAW IN VIOLATION OF AN ORDER OF DISCIPLINE

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following sanctions are generally appropriate in cases involving the practice of law in violation of an order of discipline. 8.1 Disbarment is generally appropriate when a lawyer intentionally practices law in violation of the terms of a disciplinary order. 8.2 Generally, the same discipline imposed by the original disciplinary order should be consecutively imposed when a lawyer practices law in violation of the terms of a disciplinary order, but does not engage in such conduct knowingly. **ALTERNATIVE A TO PROPOSED STANDARD 8.3** 8.3 Reprimand is generally not appropriate when a lawyer practices law in violation of the terms of a disciplinary order. **ALTERNATIVE B TO PROPOSED STANDARD 8.3** 8.3 Reprimand is generally appropriate when a lawyer negligently practices law in violation of the terms of a disciplinary order.	~~Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, t~~ The following sanctions are generally appropriate in cases involving ~~prior~~ the practice of law in violation of an order of discipline. 8.1 Disbarment is generally appropriate when a lawyer~~:~~ ~~(a)~~ intentionally ~~or knowingly violates~~ practices law in violation of the terms of a ~~prior~~ disciplinary order ~~and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or~~ ~~(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession~~. 8.2 Suspension is generally appropriate when a lawyer knowingly practices law in violation of the terms of a disciplinary order ~~has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession~~. 8.3 Reprimand is generally appropriate when a lawyer~~:~~ ~~(a)~~ negligently ~~violates~~ practices law in violation of the terms of a ~~prior~~ disciplinary order ~~and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or~~ ~~(b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession~~.	The following sanctions are generally appropriate in cases involving the practice of law in violation of an order of discipline. 8.1 Disbarment is generally appropriate when a lawyer knowingly practices law in violation of the terms of a disciplinary order. 8.2 Generally, the same discipline imposed by the original disciplinary order should be consecutively imposed when a lawyer practices law in violation of the terms of a disciplinary order, but does not engage in such conduct knowingly. 8.3 Reprimand is generally not appropriate when a lawyer practices law in violation of the terms of a disciplinary order.

ADB Comment

Note: ADB proposed Standard 8.1 was published. The Alternative Proposal's Standard 8.2 was published, and the Alternative Proposal 8.3 is Alternative A. Alternative B is the ADB proposal.

Summary of ADB Position: The ADB recommends adoption of its proposed Standard 8.0.

comment continued . . .

Discussion:

Standard 8.1 recommends disbarment for intentionally practicing law in violation of a discipline order. Standard 8.2 provides that, "Generally, the same discipline imposed by the original discipline order should be consecutively imposed when a lawyer practices law in violation of the terms of a disciplinary order, but does not engage in such conduct knowingly." There appears to be a gap which should be filled by knowing conduct.

Also, read literally, published Standard 8.2 doubles the original discipline if the lawyer negligently practices in violation of a discipline order. This causes an overlap with published Standard 8.3. Indeed, under the language of published Standard 8.2, the original discipline must be imposed consecutively even if the lawyer has no fault whatsoever. For example, a lawyer who appeals a suspension less than 180 days to the Supreme Court receives an automatic stay of discipline under the rules while the appeal is pending.[1] Generally, if the Court denies the application for leave, the Court's order includes language extending the stay for an additional 21 days. There have been cases, however, where the Court's order did not include that language extending the stay. In such a case, an attorney who engages in the practice of law during the period between the issuance of the Court's order and the lawyer's actual receipt of the order by mail has clearly practiced law in violation of a discipline order and has not "engage[d] in such conduct knowingly." Published Standard 8.2 would recommend that the attorney should receive an additional suspension of equal length (or a consecutive disbarment order). This seems unwarranted for an unintentional, unknowing violation of a discipline order.

Published Standard 8.2 states that reprimand is generally not appropriate for this type of violation. An affirmative statement setting forth the circumstances in which reprimand would be appropriate is more helpful.

The ADB believes that it's proposed Standard 8.0 improves upon the ABA version and more accurately states the appropriate levels of discipline for practicing in violation of an order of discipline.

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[1] See MCR 9.122(C) (stay pending appeal in effect until conclusion of appeal or further order of Court) and compare MCR 9.115 (stay in effect until further order of Board) and MCR 9.118(D) (Board order effective 28 days after service unless otherwise ordered).

~~9.0~~ E. Aggravation and Mitigation

9.1 GENERALLY

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.	After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.	After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

ADB Comment

Note: The three versions are identical.

Summary of ADB Position: The Board supports published Standard 9.1.

9.2 AGGRAVATION

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
9.21 Definition: Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.	9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.	9.2 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.
9.22 Factors that may be considered in aggravation include:	9.22 Factors which may be considered in aggravation~~. Aggravating factors~~ include:	9.22 Factors which may be considered in aggravation include:
(a) degree of harm to a client, opposing party, the bar, bench, or public;	(a) prior disciplinary offenses;	(a) prior disciplinary offenses;
(b) prior disciplinary offenses;	(b) dishonest or selfish motive;	(b) multiple offenses;
(c) dishonest or selfish motive;	(c) a pattern of misconduct;	(c) obstruction of the disciplinary proceeding by knowingly failing to comply with rules or orders of the disciplinary agency;
(d) a pattern of misconduct;	(d) multiple offenses;	(d) vulnerability of victim;
(e) multiple offenses;	(e) ~~bad faith~~ obstruction of the disciplinary proceeding by ~~intentionally~~ knowingly failing to comply with rules or orders of the disciplinary agency;	(e) degree of harm to a client, opposing party, the bar, bench or public.
(f) obstruction of the disciplinary proceeding by knowingly failing to comply with rules or orders of the disciplinary agency;	(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;	
(g) submission of false evidence or statements, or other deceptive practices, during the disciplinary process;	(g) refusal to acknowledge wrongful nature of conduct;	
(h) refusal to acknowledge wrongful nature of conduct;	(h) vulnerability of victim;	
(i) vulnerability of victim;	(i) substantial experience in the practice of law;	
(j) substantial experience in the practice of law;	(j) indifference to making restitution;	
(k) indifference to making restitution; and	(k) illegal conduct, including that involving the use of controlled substances.	
(l) illegal conduct, including that involving the use of controlled substances.		

ADB Comment

Note: The published proposal mirrors the ADB's except that injury or harm caused by the misconduct has been added as the first aggravating factor. (The ADB proposed standards contained references to injury in most of Standards 4.0 - 8.0).

ADB Position: The Board urges in the strongest possible terms that injury and potential injury be considered in Section D of the standards for the reasons set forth throughout these comments and in

comment continued . . .

the ADB's letter of January 26, 2005. Further, should any new factors be added to the lists of aggravating or mitigating factors the ADB respectfully requests that every effort be made to keep the numbering of the standards as close to the ABA Standards as possible. Generally, this may be achieved by adding factors to the end of the list.

9.3 MITIGATION

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
9.31 Definition: Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. 9.32 Factors that may be considered in mitigation include: (a) absence of any degree of harm to a client, opposing party, the bar, bench, or public; (b) absence of a prior disciplinary record; (c) absence of a dishonest or selfish motive; (d) serious personal or emotional problems that contributed to the misconduct; (e) timely good-faith effort to make restitution or to rectify consequences of misconduct; (f) full and free disclosure to disciplinary board or cooperative attitude toward the proceedings; (g) inexperience in the practice of law; (h) character or reputation; (i) physical disability that contributed to the misconduct;	9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. 9.32 Factors which may be considered in mitigation~~. Mitigating factors~~ include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) serious personal or emotional problems which contributed to the misconduct; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical disability which contributed to the misconduct;	9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. 9.32 Factors which may be considered in mitigation include: (a) serious personal or emotional problems which contributed to the misconduct; (b) timely good faith effort to make restitution or to rectify consequences of misconduct;
Continued on next page.	Continued on next page.	Continued on next page.

9.3 MITIGATION (CONTINUED)

Supreme Court (Published for Comment July 29, 2003)	Attorney Discipline Board (Submitted June 2002) (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	Alternative Proposal (Submitted September 2002)
(j) mental disability or chemical dependency, including alcoholism or drug abuse, when: I. there is medical evidence that the respondent is affected by a chemical dependency or mental disability; II. the chemical dependency or mental disability contributed to the misconduct; III. the respondent's recovery form the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and IV. the recovery arrested the misconduct and recurrence of that misconduct is unlikely; (k) delay in disciplinary proceedings; (l) imposition of other penalties or sanctions; and (m) remorse.	(l) mental disability or chemical dependency including alcoholism or drug abuse when: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability ~~caused~~ contributed to the misconduct; (3) the respondent's recovery form the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely; (j) delay in disciplinary proceedings. (k) imposition of other penalties or sanctions; (l) remorse; ~~(m) remoteness of prior offenses.~~	(c) mental disability or chemical dependency including alcoholism or drug abuse when: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability contributed to the misconduct; (3) the respondent's recovery form the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and, (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely; (d) delay in disciplinary proceedings (e) absence of any degree of harm to a client, opposing party, the bar, bench or public.

ADB Comment

Note: The published proposal mirrors the ADB's except that injury or harm caused by the misconduct has been added as the first aggravating factor. (The ADB proposed standards contained references to injury in most of Standards 4.0 - 8.0).

ADB Position: The ADB's position on published Standard 9.2 states the Board's views with respect to this standard also. Please see the above comment to published Standard 9.2.

~~9.0~~ E. Aggravation and Mitigation

9.4 FACTORS THAT ARE NEITHER AGGRAVATING NOR MITIGATING

Supreme Court **(Published for Comment July 29, 2003)**	**Attorney Discipline Board** **(Submitted June 2002)** (deletions from the ABA Standards ~~struck through~~ and additions double underlined)	**Alternative Proposal** **(Submitted September 2002)**
The following factors should not be considered as either aggravating or mitigating: (a) forced or compelled restitution; (b) agreeing to the client's demand for certain improper behavior or result; (c) withdrawal of complaint against the lawyer; (d) resignation before completion of disciplinary proceedings; (e) complainant's recommendation as to sanction; and (f) failure of injured client to complain.	The following factors should not be considered as either aggravating or mitigating: (a) forced or compelled restitution; (b) agreeing to the client's demand for certain improper behavior or result; (c) withdrawal of complaint against the lawyer; (d) resignation prior to completion of disciplinary proceedings; (e) complainant's recommendation as to sanction; (f) failure of injured client to complain.	The following factors should not be considered as either aggravating or mitigating: (a) forced or compelled restitution; (b) agreeing to the client's demand for certain improper behavior or result; (c) withdrawal of complaint against the lawyer; (d) resignation prior to completion of disciplinary proceedings; (e) complainant's recommendation as to sanction; (f) failure of injured client to complain.

ADB Comment

Note: The three versions are identical, except for minor changes to 9.4(d) in the published version.

ADB Position: The Board supports the published standard.